ENFORCEMENT PROCEDURES MANUAL

Idaho Department of Environmental Quality
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FOREWORD

This manual has been prepared for use by the staff and management of the Idaho Department of Environmental Quality. The goals of this manual are: 1) to provide a training tool for new environmental staff, 2) to provide a reference tool for existing staff, and, 3) to document established enforcement policies and procedures for the activities commonly carried out by the staff: inspectors and enforcement management.

The information set forth in this manual is intended solely as guidance for use by the staff of the Idaho Department of Environmental Quality. The contents of this manual are not intended to, nor do they, constitute a rulemaking by the Idaho Department of Environmental Quality. Furthermore, the content of this manual do not create any rights or benefits, substantive or procedural, enforceable at law or in equity, by any person. Nothing in this manual shall be construed to constitute a valid defense by regulated parties in violation of any state or federal environmental statute, regulation or permit. The Idaho Department of Environmental Quality reserves the right to be at variance with the contents of this manual and to change the contents at any time without public notice.

INTRODUCTION

The Idaho Department of Environmental Quality (DEQ) is the state agency charged with environmental protection. Within DEQ are a variety of programs designed to protect the quality of our air and water, and to manage waste within the state.

The Water Quality Program is largely responsible for Emergency Response/Disaster Response coordination; stormwater programs; ground water and surface water standards; wastewater programs, including land application; drinking water programs; water quality monitoring and assessment; Basin Advisory Groups and Watershed Advisory Groups; and water quality enforcement.

The Air Quality Program Office is comprised of three programs: Air Quality, Enforcement and Compliance, and Permitting. The Air Quality Program Office is responsible for administering state- and federally-mandated permit and enforcement/compliance programs for air quality, providing customer service through technical assistance, and minimizing air pollution through analysis and planning functions.

The State Waste Management and Remediation Program Office is divided into three general program areas: Solid Waste, Hazardous Waste and Remediation. The Remediation component of the program oversees emergency response activities, Superfund sites, and the Leaking Underground Storage Tank Program, as well as addressing more general site clean-up issues.

The goals of the *DEQ Enforcement Procedures Manual* are to serve as a training tool for new staff and a reference document for existing staff, and to define standard compliance and enforcement policy and procedures. In addition, this document is available to the public under the public records statute and may be used by the regulated community and public as an educational tool for understanding the authorities under which DEQ operates its compliance and enforcement programs.

The manual describes the statutory authorities under which the compliance and enforcement components are implemented, and the policies and procedures used to achieve compliance. By employing the procedures presented in this manual, personnel will be able to successfully conduct professional investigations, and develop technically accurate and legally defensible enforcement actions. Adherence to the procedures in this document will promote agency credibility by establishing successful compliance/enforcement programs that are consistent, equitable, and accountable.

How to use this manual

This manual is intended as a dynamic document subject to revision as circumstances or policies change. The manual is divided into seven main sections, a reference section, and appendices.

Section 1 defines the regulatory framework and authorities which are the foundation for the compliance and enforcement efforts implemented by the DEQ.

Section 2 describes the process of writing inspections reports: who is responsible, what a complete report should contain, and the format for documenting recommendations.

Section 3 describes information collection practices, how to determine whether a violation exists and how to cite a violation.

Section 4 discusses the administrative enforcement process, outlines the various procedures through the use of flow diagrams, and provides an example of each type of enforcement action.

Section 5 describes the civil enforcement process, defines the judicial referral process, and briefly describes both the attorney's and the inspector's roles during a civil enforcement action.

Section 6 discusses the criteria for what constitutes a criminal enforcement action and identifies the procedure to follow for referring a case for criminal prosecution.

Section 7 contains information regarding the type of documents included in DEQ files, how to manage confidential information in files, and how to comply with the public records law.

The manual also contains a list of the reference documents used in developing this manual. The list of references provides a wealth of compliance and enforcement information and is recommended as supplemental reading.

The appendices contain information referred to within the manual. Documents in the appendices were included for quick and easy reference to existing policies, procedures and guidance documents.

Section 1: Regulatory Framework/Authorities

1.1 Introduction: DEQ's Authority to Enforce Environmental Laws in Idaho

This section outlines the statutory basis of DEQ's enforcement authority, and provides an overview of the sections of Idaho's Code devoted to each medium--air, water, and waste. It also describes the federal environmental programs that DEQ has been delegated authority to enforce.

1.2 Statutes

Statutes are laws enacted by the legislature. According to the State of Idaho, Administrative Rules Manual 1994, "statutes establish most of the powers and functions of administrative agencies." The Environmental Protection and Health Act of 1972 (EPHA), found at Idaho Code, Title 39, Chapter 1, declares that it is the policy of the state of Idaho to provide for the protection of the environment and the promotion of personal health and to protect and promote the health, safety and general welfare of the people of the state. Idaho Code §39-102(1) states that the Department of Environmental Quality (DEQ), is empowered to administer the provisions of the EPHA. The EPHA and Hazardous Waste Management Act (HWMA) grant the Department the powers and duties to protect the environment through use of the Department's enforcement authorities. In March 2000, the legislature passed a bill making DEQ an autonomous department rather than a division of the Department of Health and Welfare.

1.3 Powers and Duties of the Director

The executive and administrative power of the department is vested in the Administrator of the department. The Administrator's powers and duties include formulating and recommending to the Board of Environmental Quality (Board) rules, regulations, codes, and standards, as may be necessary to deal with problems related to certain specific environmental concerns. The Administrator, under the rules, regulations, codes or standards adopted by the board, supervises the promotion and protection of the environment and health of the people of this state. The powers and duties of the Administrator specific to the protection of the environment include, but are not limited to, the following:

- issuance of licenses and permits as prescribed by law and the rules and regulations of the board;
- supervision and administration of laboratories and the standards of tests for chemical analyses of environmental pollution;
- enforcement of standards, rules, and regulations relating to public water supplies;
- supervision and administration of a system to safeguard air quality by limiting and controlling the emission of air contaminants;

- supervision and administration of a system to safeguard the quality of the waters of this state, including but not limited to the enforcement of standards relating to the discharge of effluent into the waters of this state and the storage, handling and transportation of solids, liquids and gases which may cause or contribute to water pollution;

- supervision and administration of administrative units whose responsibility shall be to assist and encourage counties, cities, other governmental units, and industries in the control and/or abatement of environmental and health problems;

- administration of solid waste disposal site and development review in accordance with the provisions of chapter 74, title 39, Idaho Code and chapter 4, title 39, Idaho Code;

- enforcement of all laws, rules, regulations, codes and standards relating to environmental protection and health;

- formulation and adoption of a comprehensive state nutrient management plan for the surface waters of the state of Idaho in consultation with the appropriate state or federal agencies, local units of government and with public involvement as provided for under the administrative procedures act;

- formulation of a water quality management plan for Priest Lake in conjunction with a planning team from the Priest Lake area whose membership shall be appointed by the board and consists of a fair representation of the various land manager, user and interest groups of the lake and its Idaho watershed; and

- the authority to develop and propose regulations as necessary to ensure compliance with the Solid Waste Facilities Act.

1.4 The Board of Environmental Quality

The board of environmental quality consists of seven members appointed to four-year terms by the governor, with the advice and consent of the senate. Members may be removed by the governor for cause. Each member must be a citizen of the United States, a resident of the state of Idaho and a qualified elector. Not more than four of the board members may be from any one political party. All members are chosen with due regard to their knowledge and interest in environmental protection and health. Each year the board elects a chairman, vice-chairman and a secretary.

The board meets five times per year, approximately every 2-3 months. By affirmative vote of four of its members, the board may adopt, amend or repeal the rules, codes, and standards of the department that are necessary and feasible in order to carry out the purposes and provisions of the EPHA and to enforce the laws of this state. The rules and orders so adopted and established have the force and effect of law and may deal with any matters deemed necessary and feasible for protecting the environment or the health of the state. The effective date of a final rule adopted by the board is subject to legislative review during the succeeding session of the Idaho Legislature, as per Idaho Code § 67-5224. A temporary rule adopted by the board can become effective immediately;

however, the duration of the temporary rule is subject to legislative review during the next succeeding session of the Idaho Legislature (Idaho Code § 67-5226).

1.5 Enforcement Powers and Duties Authorized by the EPHA and HWMA

The majority of DEQ's enforcement authorities are derived from the Environmental Protection and Health Act (EPHA). The Hazardous Waste Management Act of 1983 (HWMA), found at Idaho Code § 39-4401 through 39-4432, provides enforcement authorities specificto hazardous waste. The HWMA and EPHA enforcement authority procedures and processes are similar. For the purpose of this manual, one may assume that the enforcement steps are the same unless otherwise noted. These and other Idaho statutes give authority to all program-specific rules, regulations, standards, plans, licenses, permits, certificates or orders promulgated thereunder.

It is important to look at the framework of authorities outlined in both EPHA and HWMA. Following is a brief discussion of each of the major sections of the EPHA and HWMA which address DEQ's enforcement authority.

1.6 Environmental Protection and Health Act (EPHA) of 1972

Section 39-108 of the EPHA provides DEQ with the authority to investigate, obtain access, inspect, and proceed with administrative or civil enforcement actions based upon the receipt of information concerning an alleged violation of the act or of any rule, regulation, permit or order promulgated pursuant to the act.

Section 39-108 also gives DEQ authority to continually observe and periodically inspect actual or potential health hazards, air contamination sources, water pollution sources, noise sources, and solid waste disposal sites. If DEQ determines any person is in violation of any provision of the act or any rule, regulation, permit or order issued or promulgated pursuant to the act, DEQ has the authority to commence administrative or civil enforcement action. This section outlines the civil penalty framework, cost recovery of the state's expenses incurred by enforcing the act, and the procedure for commencing civil enforcement action when imminent and substantial danger exists to public health or the environment. The specifics of the administrative and civil enforcement processes implemented by DEQ are discussed in Sections 4 and 5 of this manual.

Section 39-108(4) provides that "No civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, regulation, permit or order issued or promulgated pursuant to this chapter, more than two (2) years after the director had knowledge or ought reasonably to have had knowledge o the violation." In other words, a two-year statute of limitations applies (see Section 1.9 of this manual).

Section 39-109 gives the board or director the authority to request the Attorney General's office to commence civil or criminal enforcement action.

Sections 39-110 and 39-111 require the registration of persons engaged in operations or construction where air pollution is a factor and provide for the confidential treatment of certain production, sales

figures or process/production information provided by air or water pollution sources to the department subject to Chapter 3, title 9, Idaho Code.

Section 39-112 affords the department the authority to require or order sources emitting air pollution which has been determined to cause imminent danger to human health or safety to fix, reduce, or discontinue the emission activities immediately.

Section 39-115 authorizes the department to issue pollution source permits in compliance with regulations or rules established by the board; to sue any facility determined to have violated the source permit, or facilities that construct an industrial or commercial air pollution source without permit; and to collect a fee from the facility for processing applications for the permit.

Section 39-116 provides the authority to issue compliance schedules to any person who is the source of any health hazard, air contaminant, water pollution, solid waste or noise for which regulatory standards have been established, to assure timely compliance with those standards.

Section 39-117 establishes the criteria for criminal misdemeanor charges and penalties for any person who willfully or negligently violates the provisions of the public health or environmental protection laws.

Section 39-118 requires DEQ approval and review of all plans and specifications prior to the construction, modification, or expansion of sewage systems, sewage treatment plants or systems, other waste treatment or disposal facilities, public water supply systems or public water treatment systems.

Section 39-118A requires DEQ approval and review of all plans and specifications prior to the construction of a new ore-processing facility, or modification or expansion of an existing ore-processing facility, that is intended to contain, treat, or dispose process water or process-contaminated water containing cyanide.

For additional information, refer to the Environmental Protection Health Act, found at Idaho Code, Sections 39-101 through 130.

1.7 Hazardous Waste Management Act of 1983 (HWMA)

Section 39-4404 establishes that the State of Idaho enact and carry out a hazardous waste program that enables the state to assume primary control from the federal government over hazardous waste. It directs the Board to promulgate rules consistent with the federal Resource Conservation and Recovery Act (RCRA) regulations adopted by the Administrator of the United States Environmental Protection Agency (EPA). It limits the Board from promulgating any rule that would impose conditions or requirements more stringent or broader in scope than RCRA and the RCRA regulations.

Section 39-4405 provides for the adoption of the federal RCRA regulations by reference into rules for the management of the generation, collection, transportation, treatment, storage and disposal of hazardous wastes within the state and for the regulation of persons who produce, burn, distribute and market fuel containing hazardous waste.

Section 39-4406 establishes the general powers and duties of the director to assume and maintain primacy over hazardous waste management pursuant to RCRA.

Section 39-4407 establishes the criteria for identifying whether wastes are non-hazardous or hazardous.

Section 39-4408 prohibits the unauthorized treatment, storage, release, use or disposal of hazardous waste into the environment unless the activity is explicitly allowed by permit, variance, or permit exemption.

Section 39-4409 prohibits the construction, operation or modification of a hazardous waste treatment, storage or disposal facility without a permit.

Section 39-4410 provides for the promulgation of rules and regulations related to intrastate and interstate transportation of regulated hazardous waste.

Section 39-4411 provides for the adoption of rules and regulations prescribing procedures necessary for the maintenance and submittal of records, and the reporting and monitoring information required by these rules.

Section 39-4412 gives duly authorized state employees or representatives authority to perform inspections and searches. This section sets forth the procedures under which the department has the authority to perform inspections, collect samples, inspect and obtain records with consent, or under an administrative search warrant obtained from a magistrate or district court judge.

Section 39-4413 sets forth the authorities and procedures for the department when the department determines that a person is in violation of any provision of HWMA, or any permit, rule, regulation, condition, requirement, compliance agreement or order issued or promulgated by HWMA. The statute sets forth the procedures and authorities for the administrative enforcement, permit suspension or revocation proceedings, or civil enforcement procedures available to the department.

Section 39-4414 provides the remedies available to the department in the event the department determines a person has violated HWMA, or any permit, standard, rule, regulation, condition, requirement, compliance agreement, or order issued or promulgated pursuant to HWMA. The remedies available include collection of penalties, assessment of costs, restraining orders, injunctions and other relief deemed appropriate. This statute directs DEQ to deposit any monies recovered from enforcement proceedings into the hazardous waste emergency account created by section 39-4417.

Section 39-4415 sets forth the authority for the Attorney General's office to prosecute any person who knowingly violates any provision of the HWMA, or any permit, standard, regulation, condition, requirement, compliance agreement, or order issued or promulgated pursuant to HWMA. This section also sets forth the maximum monetary fine and terms of imprisonment associated with misdemeanor violation(s).

Section 39-4416 is a citizen suit provision that allows any person who has been injured or damaged by an alleged violation of any permit, standard, regulation, condition, requirement, compliance

agreement, or order issued pursuant to HWMA, to commence a civil action on that person's own behalf against any person alleged to have committed the violation. Such an action may not be commenced if the department is diligently prosecuting an administrative, civil or criminal action to require compliance with the identical law. Idaho Code §39-4416 allows an interested person to intervene in the state's case, and the department to intervene as a matter of right in the citizen suit.

Section 39-4417 creates the hazardous waste emergency account in the state treasury. All fines and penalties collected from hazardous waste enforcement actions are deposited into the hazardous waste emergency account for the sole use of paying the necessary costs of preventing, neutralizing, or mitigating any threat to the public health or safety, or to the environment, caused by a hazardous waste emergency situation.

Sections 39-4417B through 39-4432 address various administrative and procedural aspects of the implementation of the state hazardous waste program. For additional information, refer to the Hazardous Waste Management Act found at Idaho Code, Sections 39-4401 through 39-4432.

1.8 Solid Waste Management

Section 39-7404 establishes that the State of Idaho enact and carry out a municipal solid waste program that enables the state to assume primary control from the federal government over municipal solid waste. This section directs the Board to promulgate rules consistent with the federal Resource Conservation and Recovery Act (RCRA) regulations adopted by the administrator of the United States Environmental Protection Agency (EPA). It limits the board from promulgating any rule that would impose conditions or requirements for municipal solid waste more stringent or broader in scope than RCRA and the RCRA regulations.

Section 39-7406 establishes the general powers and duties of the counties, director and local health districts in regard to municipal solid waste.

Section 39-7407 establishes site certification restrictions for new and existing municipal solid waste units and lateral expansions.

Section 39-7408 establishes the criteria for site certification, requirements of the applicant and the application review and approval/rejection time limits for the department. Section 39-7408(A), (B), (C) & (D) establish the site certification procedures for a commercial solid waste facility, site review panel, establishment of a commercial siting license fee, and duties of the director relative to the siting application, respectively.

Section 39-7409 establishes the design requirements for liner design, point of compliance and leachate discharge.

Section 39-7410 establishes the criteria for ground water monitoring design.

Section 39-7411 establishes the design review procedure for a municipal solid waste landfill unit and the department's review period.

Section 39-7412 establishes the standards for operation criteria for all municipal solid waste landfill units.

Section 39-7413 provides that prior to operation of a municipal solid waste landfill unit, all operations plans shall be submitted to the health district with jurisdiction and an operating certificate be issued by the health district with jurisdiction.

Section 39-7414 provides for assessment monitoring and corrective action whenever a statistically significant increase over background has been detected for one (1) or more constituents listed in 40 CFR 258, Appendix I or an alternative list approved in accordance with 40 CFR 258.54(a)(2).

Section 39-7415 establishes standards for closure for all municipal solid waste landfill units receiving wastes on or after October 9, 1993, except as provided by 40 CFR 258, and units that accepted waste after October 9, 1991, but ceased to accept waste prior to October 9, 1993.

Section 39-7416 establishes standards for post-closure care for municipal solid waste landfill units receiving wastes on or after October 9, 1993, except as provided by 40 CFR 258.1.

Section 39-7417 establishes requirements for financial assurance for closure, post-closure care and corrective action.

Section 39-7418 identifies modifications to approved municipal solid waste landfill units that require amendment approval.

Section 39-7419 provides that all municipal solid waste landfill units shall be subject to routine inspections by county, director and health district representatives in accordance with relevant provisions of the Idaho Code. This section also mandates a comprehensive review inspection of all municipal solid waste landfill units every 3-5 years. These inspections shall be conducted jointly with the landfill owner, county, director and health district.

Section 39-7420 sets forth the authorities and procedures for each public agency with responsibility for enforcement of the requirements established in this chapter. This section also specifies that the director may assume the authority otherwise to be implemented by a district if the district fails to carry out responsibilities established in this chapter.

1.9 Statute of Limitations

Pursuant to Idaho Code Sections 39-108 and 39-4413, of the EPHA and HWMA respectively, no civil or administrative proceeding may be brought to recover for a violation of either act or any permit, standard, regulation, condition, requirement or order issued or promulgated pursuant to either act more than two (2) years after the director (or an officer of the department) had knowledge or ought to reasonably have had knowledge of the violation. This concept is commonly referred to as the "statute of limitations." In actual practice, if the department desires to pursue an administrative or civil action against a person for committing a violation, then it must do so within two years from the day the violation was observed, discovered, documented, or otherwise brought to the attention of the director or any officer of the department. A violation may be a continuing violation,

whereupon each day starts a new two-year time period. It is generally a legal determination whether a violation is continuing, or is a discrete violation.

Refer to Section 3 of this manual for more information regarding discrete versus continuing violations.

1.10 Permit Suspension and Revocation

Both the EPHA and HWMA refer to the Idaho Administrative Procedures Act (APA) found at Idaho Code §§ 67-5201 through 67-5275, in the event that permit suspension or revocation is necessary. The APA provides that no revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending formal proceedings for revocation or other action. APA proceedings shall be promptly instituted and determined.

1.11 Rules, Regulations, and the Rulemaking Process

It is often unclear what the difference is between a rule and a regulation. Can the two be used synonymously ? The answer is no, they can not. Rules govern what the public may or may not do in a manner consistent with the statute's purpose. In the Idaho Administrative Procedures Act (APA) Idaho Code §§67-5201 et seq., administrative rules are defined as "rules;" they are **not** "regulations," "rules and regulations" or "policies." In order to avoid repetition, often the term "policy" or "regulations" is used but the official statutorily defined word for all of these is rule when referring to an administrative rule adopted under the APA. Internal agency procedures, interpretations and guidelines are referred to as "policy or policies." For example, this document sets forth **policy** and **procedures** to be followed by DEQ in carrying out the intent of the Legislature as expressed in the **rules** cited above. The **rules**, in turn, express the state's means of following federal **regulations**.

There are some statutory references to rules as "regulations" outside the APA, but they are gradually being corrected. Idaho refers to federal rules as "regulations." Federal regulations become rules only if adopted under the APA as rules. For example, the federal Resource Conservation and Recovery Act (RCRA) regulations are adopted by reference under the APA as rules under the authority of HWMA. Therefore, the federal regulations adopted by Idaho are referred to as rules (e.g. the Rules for Hazardous Waste).

Rules do not dictate how to go through the administrative enforcement process, but should be viewed as the foundations for enforcement. The enforcement procedure is found within the scope of the statutes. Rules authorize DEQ to undertake some of the actions and activities that can be used as enforcement tools. For example, the conditions placed in permits allow DEQ to use permit regulation authority to require the permittee to consent to inspections or require permittees to submit specific monitoring information to DEQ.

There are 19 chapters of specific rules governing the activities of the Department of Environmenta Quality. When these rules or standards are cited, they are cited by reference to IDAPA 58.01. The acronym "IDAPA" does not stand for the "Idaho Administrative Procedures Act"; it simply designates the numbering system for the rules promulgated under the APA. The number 58 following IDAPA denotes that these are the rules specific to the Department of Environmental Quality; the 01 designates the Title number; and the various Chapter numbers (01-21) follow to designate the specific environmental rule or standard.

The rule-making process includes publishing proposed rules, modifications, changes, etc. in the Idaho Administrative Bulletin, which is published on a monthly basis. Rule-making activities are codified annually in the Idaho Administrative Code.

The 1996 Legislature amended the rulemaking procedures of the APA (S. 1293, effective 1/1/96). The current APA provides that a rule that has been adopted by an agency under the regular rulemaking process is a pending rule subject to legislative review before becoming final and effective. Unless provided otherwise in the rule, the pending rule becomes final and effective upon the conclusion of the legislative session to which the rule was submitted for review, unless the rule is approved, rejected, amended or modified by concurrent resolution in accordance with Sections 67-5224 and 67-5291, Idaho Code.

The APA also provides that any pending rule imposing a fee or charge shall not become final and effective until the rule has been approved, amended or modified by concurrent resolution.

The APA specifies that an agency cannot adopt a temporary rule unless the governor first finds that the temporary rule meets one of the following conditions listed at section 67-5226 Idaho Code: The rule must be: a) reasonably necessary to protect the public health, safety, or welfare; b) necessary for compliance with deadlines in amendments to governing law or federal programs; or c) conferring a benefit. Once adopted by an agency, a temporary rule may not remain in effect beyond the conclusion of the next succeeding legislative session unless the rule is approved, amended or modified by concurrent resolution.

Pursuant to Idaho Code, Section 67-5205, a copy of the administrative rules must be maintained in designated repositories in each region of the state. At DEQ, a copy is maintained in the in-house Attorney General's office. The paralegal within the AG's office is responsible for sending to each division of DEQ a monthly update from the Idaho Administrative Bulletin that lists any rule-making activities relevant to DEQ.

The following is a categorical list of DEQ rules promulgated under the APA. The administrative rules can be found in the IDAPA 58, Title 01.

Chapter 1	Rules for the Control of Air Pollution in Idaho
Chapter 2	Idaho Water Quality Standards and Wastewater Treatment Requirements
Chapter 3	Rules for Individual/Subsurface Sewage Disposal Systems

Chapter 4	Rules for Administration of Wastewater Treatment Facility Grants
Chapter 5	Rules and Standards for Hazardous Waste
Chapter 6	Idaho Solid Waste Management Rules and Standards
Chapter 7	Reserved
Chapter 8	Idaho Rules for Public Drinking Water System
Chapter 9	Rules Regulating Swine and Poultry Facilities
Chapter 10	Reserved
Chapter 11	Ground Water Quality Rule
Chapter 12	Rules for Administration of Wastewater Treatment Facility Loans
Chapter 13	Rules for Ore Processing by Cyanidation
Chapter 14	Rules for Administration of Agricultural Water Quality Program in Idaho
Chapter 15	Rules Governing the Cleaning of Septic Tanks
Chapter 16	Rules for Nutrient Management
Chapter 17	Wastewater - Land Application Permit Rules
Chapter 18	Idaho Land Remediation Rules
Chapter 19	Small Communities Improvement Program Rules
Chapter 20	Rules for Administration of Drinking Water Loan Account
Chapter 21	Rules Governing the Protection and Disclosure of Records in the Possession of DEQ

1.12 Federal Programs Administered by the State

Many federal environmental programs are administered and implemented by DEQ. In cases where DEQ has not been authorized to operate a particular program, that program is likely to be administered and implemented by a federal agency such as EPA. When the state administers the program in lieu of the federal government, it is often referred to as the state having "primacy," "authorization" or "delegation." This means the state has applied to and received the approval, or been mandated by the federal government, to administer and implement a program. Typically, an

approval is supplemented with federal monies or grants which provide for the administration and implementation of the program. In order to implement a federal program on the state level, the rule-making process as described above is needed to adopt the federal regulations into state rules, or a state-specific set of program rules must be drafted and adopted. The following is a description of the status of programs for which the state of Idaho has received the approval of the EPA to administer and implement.

1.12.1 State Waste Management and Remediation Program (SWM/RP) - The federal Resource Conservation & Recovery Act (RCRA) found at 40 U.S.C. 6901 et seq. is administered and implemented by the DEQ under the Idaho Hazardous Waste Management Act (HWMA). The SWM/RP is authorized to implement, in the state of Idaho, all federal RCRA regulations EPA has published as final through June 30, 1996.[1] An extension of this authorization through June 30, 1998 is currently in process. The federal RCRA regulations are incorporated by reference each February or March to adopt the regulations that were federally promulgated up through July 1 of the previous year. In instances where the state has not secured authority to enforce new regulations or regulations promulgated after July 1, or regulations that have not been adopted as state rules, the state normally defers the enforcement of those rules to EPA. The program administered by the state includes permitting, compliance, and enforcement activities related to hazardous waste generators, transporters, treatment, storage and disposal facilities.

The Hazardous and Solid Waste Amendments of 1984 (HSWA) created the opportunity for states to seek an authorized program, set stringent timetables for issuance of operating permits and inspections of permitted facilities, require corrective action be taken for all releases of hazardous waste, impose land disposal restrictions and regulate underground storage tanks, used oil, boilers, burners and industrial furnaces (BIFs).

EPA was granted formal authority to enforce the HSWA regulations effective immediately, until the states could adopt them as state rules and thereby become authorized to enforce the rules themselves. For HSWA regulations adopted as state rules (but not authorized by EPA) EPA has chosen to defer to the state for enforcement. This allows Idaho to maintain one voice to the regulated community in the interim of revising state authorization for new rules. Non-HSWA regulations are not effective in the state until they are adopted as state rules, at which time they become fully enforceable by the state.

1.12.2 Solid Waste Program - The federal Resource Conservation & Recovery Act (RCRA) found at 42 U.S.C. 6901 et seq. is administered and implemented under the Idaho Solid Waste Facilities Act (ISWFA) by DEQ. The state municipal solid waste program is authorized to implement, in the state of Idaho, all federal RCRA regulations EPA has published regarding municipal solid waste. Approval of the Idaho Municipal Solid Waste Program was received from EPA on September 21, 1993. For federal regulations after this date, the ISWFA provides that, any time 40 CFR 257 or 258 is amended to allow additional flexibility or extension otherwise prohibited by ISWFA, this flexibility or extension will be allowed as applicable.

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[1]The lone exception is section CC Air Emissions Standards for Tanks, Surface Impoundments and Containers (the CC Rule).

Non-municipal non-hazardous waste is administered and implemented under IDAPA 58.01.06, Solid Waste Management Rules and Standards.

1.12.3 Air Programs - To control air pollution, statutes within the EPHA provide DEQ with the authority to regulate air pollution sources. To accomplish this, Idaho adopted the federal regulations promulgated under the federal Clean Air Act (CAA) in 40 CFR 52 Approval and Promulgation of Implementation Plans (Prevention of Significant Deterioration); 40 CFR 60 Standards of Performance for New Stationary Sources; and 40 CFR 61 & 63 National Emission Standards for Hazardous Air Pollutants. These can also be found as state rules in IDAPA 58.01.01 Rules for the Control of Air Pollution in Idaho. Most compliance and enforcement activities related to air pollution sources in Idaho are conducted within the Air Quality Program of DEQ.

1.12.4 Water Quality Programs - To protect the ground and surface waters of the state of Idaho, statutes provide DEQ with the authority to regulate several activities, including ore processing by cyanidation, wastewater land application, and construction of waste treatment or disposal facilities. While there is no specific federal authority related to these activities, the state program operates under the mandates of the federal Clean Water Act (CWA). The permitting, compliance and enforcement of facilities which are subject to the statutes and rules below are primarily performed by both the Water Quality and Solid Waste Management and Remediation Programs of DEQ.

These authorities are provided under Idaho Code, Sections 39-1 Health and Safety Laws; 39-118 Plan and Specification Review; 39-118A Ore Processing by Cyanidation; 39-120 through 39-127 Idaho Ground Water Quality Plan; and the general authorities provided under IDAPA 58.01.01-17 Idaho Department of Environmental Quality Rules, all sections as applicable, which include 58.01.02 Rules for Water Quality Standards and Wastewater Treatment Requirements; IDAPA 58.01.13 Idaho Rules for Ore Processing by Cyanidation and IDAPA 58.01.17 Rules for Wastewater Land Application Permits.

There are two water quality standards which are commonly used in the protection of state waters. In particular, Section 58.01.02.800 requires adequate measures be taken for the storage and control of hazardous and deleterious materials in the immediate vicinity of state waters to prevent spills or releases. Section 58.01.02.850 is cited in the event that an unauthorized release of a hazardous material has occurred to state waters, or to land if there is a likelihood that it will enter state waters.

Section 58.01.02.851 of the water quality standards addresses the reporting and investigating requirements for petroleum releases. Section 58.01.02.852 provides the corrective action requirements for owners of petroleum storage tanks with confirmed petroleum releases.

Idaho has authority to administer/implement the various water quality programs identified under the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, commonly referred to as the Clean Water Act and referred to below as the Act.

Section 303 of the Act mandates that states or EPA adopt water quality standards and implementation plans for the protection and propagation of fish, shellfish, and wildlife. The 1987 amendments to the Clean Water Act required states to adopt water quality criteria for toxic substances In 1992 the EPA promulgated the National Toxics Rule which imposed water quality

criteria for toxic substances in Idaho waters. In 1994, Idaho adopted by reference into IDAPA 58.01.02 Idaho Rules for Water Quality Standards and Wastewater Treatment Requirements, the National Toxics Rule, which resulted in making the national criteria official state standards. As required under the Act, the state water quality criteria and standards are subject to a review process by EPA every 3 years.

Section 401 of the Act provides states the authority to approve, conditionally approve, or disapprove certain federal licenses or permits which may result in any discharge into navigable waters. This process is known as 401 Certification. The goal of the certification process is to ensure that state water quality standards are achieved as a result of federally permitted and monitored activities which discharge to navigable waters.

1.13 Programs Under Federal Authority Only

The National Pollutant Discharge Elimination System (NPDES), Section 402 of the Act, provides states with the authority to administer a permit program to issue permits for discharges to navigable waters of the state. To date, Idaho has elected not to apply for the NPDES permitting program NPDES permitting in Idaho is performed by the EPA.

Permit for Dredged or Fill Material, Section 404 of the Act, provides states with the authority to administer a general permit program for the discharge of dredged or fill material into the navigable waters within the state. To date, Idaho has also elected not to apply for the dredge and fill permitting program. Dredge and fill permits in Idaho are issued by the U.S. Army Corps of Engineers.

Section 2: Writing the Inspection Report

2.1 Introduction to Inspection

This section of the manual focuses on the process of writing an inspection report. It outlines the inspector's responsibilities, the necessary steps in developing an inspection report, the key elements to be included in the report and the importance of supporting documents.

Inspections are conducted either as agreed to in a work plan approved by EPA, or in response to citizen complaints. As previously discussed in Section 1, the authorities for conducting inspections are outlined in Idaho Code § 39-108 of the EPHA, and § 39-4412 of the HWMA. An inspector's routine duties include: conducting inspections at reasonable times, requesting consent to enter and inspect the premises, requesting a search warrant if consent has been denied and documented, providing split-samples if requested (as applicable) and obtaining and/or copying records or other evidence.

Key components of performing a facility inspection include:

- pre-inspection file review;
- site entry/access;
- opening conference or inbriefing;
- visual inspection of the facility operations and physical premises ;
- review of facility documents and recordkeeping practices;
- determining compliance with applicable rules, regulations, standards and permit requirements;
- sampling (water and waste programs), visible emission readings (air program), photographing, and other evidence collection activities;
- filling out checklists or compliance determination documents for the facility's records;
- conducting a closing conference or debriefing (outbriefing);
- follow-up activities, including database searches, sample analysis, interviews, and additional inspections, if necessary.

Detailed instructions on how to perform these activities will not be provided in this manual since DEQ provides significant training to inspection personnel. Reference to the following media-specific inspection training manuals is recommended:

1. *USEPA Revised RCRA Inspection Manual*, October 1993, OSWER Directive 9938.02b.

2. *Inspection Guidance Manual*, October 1995, prepared by the former Technical Services Bureau of DEQ; and *Procedures Manual for Air Pollution Control*, September, 1986.

3. *Basic Inspector Training Course- Fundamentals of Environmental Compliance Inspections*, Compliance Policy and Planning Branch, Office of Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, February, 1989.

2.2 Writing the Inspection Report

Once the facility inspection has been completed, it is the inspector's primary responsibility to write an inspection report which documents all observations made and information obtained during the inspection. The primary purpose for the written inspection report is to document the facility's compliance or noncompliance with permits and/or specific environmental laws. The inspection report is used to support or refute allegations of noncompliance which may result in a recommendation for administrative, civil or criminal enforcement action. The inspection report is usually the first step of the enforcement process. Without it, enforcement may be delayed. Inspections are sometimes performed by more than one inspector. Typically, a lead or primary inspector is assigned to plan and ensure completion of the inspection and to be the designated agency contact person for the facility Generally, it is the responsibility of the lead inspector to draft the inspection report, or to otherwise ensure its successful completion.

2.3 Inspection Report Preparation Process and Key Components

Typically, inspectors compile field notes. These include their observations, field data collected, statements made by facility representatives, and observations based on their review of the facility and facility records. Field notes may be contained in a specific bound field notebook designated solely for a particular inspection, in a logbook which contains notes from other inspections, or as notes made on a looseleaf paper or note pad. Pages should be numbered and dated. All field notes must be kept and maintained as part of the official DEQ file. Inspectors should not keep personal inspection files. All documents generated by a DEQ employee shall be stored in the relevant agency file, as stated in the Policy Memorandum: Policy for Records Management. (See Appendix A.)

The first objective in the process of writing an inspection report is to review all the information collected during the inspection to identify any potential incomplete or missing information. If it is determined that information is missing, the inspector should immediately contact the appropriate facility representative to explain the situation, and then make a verbal **and** written request for the missing information.

The next step in the report-writing process is to organize the information obtained from the inspection into a usable format. The following excerpt from the *RCRA Inspection Manual*, OSWER Dir No. 9938.02(b), directs that written reports be:

* Accurate - All information must be factual and based on sound inspection practices; observations should be the verifiable results of first-hand knowledge and must be objective and factual.

* Relevant - Information in an inspection report should be pertinent to the subject of the report; irrelevant data clutter a report and can reduce its clarity and usefulness.

* Comprehensive - The subject of a report (e.g., suspected violations) should be substantiated by as much factual, relevant information as possible. The more comprehensive the evidence is the better and easier the case development process becomes.

* Coordinated - All information pertinent to the subject should be combined into a complete, well-organized, lucid package. Documentary support (photographs, photocopies, statements, sample analyses, checklists, etc.) accompanying the report should be clearly referenced so that any interested party reading the report gets a complete and clear overview of the subject. Additionally, the report should be neat and legible.

* Objective - Reports should be free of unsubstantiated or inconclusive statements or any other potential indicators of inspector bias.

The third step is to choose a format for the inspection report. The narrative report format is one preferred style because of the use of full sentences to describe, explain or discuss observations in detail as they pertain to compliance. Other formats, such as form reports, outlines, file notes or chronologies, are also recognized as acceptable formats for reporting. Often, attorneys and courts prefer the IRAC format, denoting the Issues, Rules, Analysis, and Conclusion (thus IRAC). Regardless of the format chosen, at a minimum the report should always be able to answer the 5 W's: the "who, what, when, where, and why" of the case. It doesn't hurt to add the "how" as well, if the information is available. Comprehensive and appropriate checklists can be used to contain the majority of the inspection information, provided the narrative report deals with the facts and supporting information for violations.

The fourth and final step of the report writing process begins with the transcription of field notes into complete representations using full sentences. The narrative portion of an inspection report should include a comprehensive expansion of the inspector's field notes and any corresponding checklists, with reference made to any supporting documents. Hence, an inspector should take great care when performing the inspection to record in the field notes only factual observations, information and statements. The inspector must be careful not to omit any information identified in the field notes. Such omissions could potentially be detrimental should the case move into litigation. Any discrepancies between field notes and final reports open the door for a defense attorney to attempt to discredit the inspector by pointing out omissions and inconsistencies. Inspectors should **never** include assumptions or form or express personal opinions when performing an inspection, or afterwards when compiling the inspection report. The inspection should be performed in an objective and unbiased manner, which should be reflected in the field notes and the subsequent final report.

When drafting an inspection report it is important to consider who the potential audience may be. Since nearly every document generated by a DEQ employee becomes a public record, it is conceivable that the report may be read by the general public, the regulated community, reporters, legislators, etc. **It is also important to assume that any inspection may result in enforcement action or litigation**, in which case attorneys, judges, expert witnesses, jurors, etc. may also review the report. The report must be factually correct, unbiased, and sound, both from a scientific and regulatory perspective. It is critical that reports and files be prepared in a manner that will be useful in future case development, inspections and other activities.

The California Air Resources Board (CARB) Training Manual summarizes eloquently the objective of a well-written report:

> The more thorough and intelligent the form of the report is, the more believable will be its substance. The goal of the inspector's report should be the same as the lawyer's court documents; written not so that persons reading in good faith will understand it, but so that persons reading in bad faith will not misunderstand it.

2.4 Supporting Documents

Sometimes, an inspection checklist is used as a tool to keep the inspection focused on specific facility permit requirements or environmental rules. A copy of the completed checklist and initial compliance determination document must be provided to the facility at the conclusion of the inspection. During an air quality inspection, visible emissions (opacity) from a stack are recorded utilizing the DEQ - Visible Emission Observation Form (VEE Form; see Appendix B). The inspection checklists and VEE Forms should be appropriately filled out in ink by the inspector. If there are portions of a checklist or VEE Form that do not apply they should be identified as "NA" or "Not Applicable." Areas where a requirement was identified on the checklist as being in "noncompliance" should be explained in greater detail in the inspection report. Any changes to a checklist or VEE Form should be lined through and initialized by the inspector. Finally, the checklist/VEE Form should be included as an attachment to the final inspection report and appropriately referred to within.

Often evidence is collected during inspections. Evidence can take many shapes and forms, such as photographs, videotapes, audiotapes, samples, field monitoring results, visible emissions readings, readings from facility monitoring equipment and copies of facility documents. All of these forms of evidence may be crucial to support findings of compliance or to demonstrate noncompliance. All evidence collected should be described in the field notes of the inspector who collected the evidence, and then discussed in greater detail in the comment section of the form report or in the narrative inspection report. For example, photographs should be referenced in the inspection report when discussing the subject of the photograph. A record of all evidence collected should be included as an attachment to the final inspection report and properly referenced within.

When photographs are taken during an inspection, some basic considerations generally apply. Do not write on the back of the photos in pen, as it may degrade the photograph over time. Instead, use labels or cross references to a photo log to identify photographs. In either case, the following information should accompany each photograph:

- photographer's name or initials;
- inspection type;
- date photograph taken (even if photo has a date imprint);
- facility name;
- facility location;
- facility database number, if appropriate (e.g. RCRIS or AIRS number);
- description of photo subject (i.e. scrubber stack, drum label, etc);
- direction from which the photo was taken (i.e. viewing southeast, looking to the northwest);
- numbering (each photo should be numbered with the same number that is assigned to the corresponding photo label or log).

Photographs used in an inspection report should be either mounted in plastic protective storag e pages, with labels affixed to the back of each photo, or mounted with double-sided tape on 8 1/2 by 11 sheets of heavy paper with the corresponding photo label directly beneath each photo. Assign a number to each photo and affix a small round label on the front of each photo with the photo number written on it

Any photos of the facility that are not included with the inspection report (such as blurry ones, or extras of the same shot, etc.) and ALL negatives of the photos taken at a facility MUST be saved. Place these photos/negatives in an envelope or clear phot o storage device and label it with the facility name, location, date, inspection type and photographer name. These photos and negatives must be referenced in the inspection report and contained in the DEQ facility files.

When using recording devices for collecting evidence, be aware that your statements are also being recorded, so professionalism is of the utmost importance. If a video camera has the ability to display the date and/or time during the filming, this option should be utilized. Accurate recorder time will document the actual time activities occurred so there is no question as to the authenticity of the tape. Narration during videotaping should be limited to the inspector's observations, as seen through the camera, and statements of fact. When possible, be sure to orient the viewers of the videotape as to the directional relationship of the objects or activities being captured on film (e.g. the drum is located 100 feet east of the warehouse, this view taken looking to the north; or the black smoke from th e stack is drifting to the northwest, this view is looking to the north). Do not include personal opinions or unnecessary comments which could be damaging at a later date should this evidence be challenged in a future enforcement proceeding.

When samples are collected, great care should be taken by the inspector to describe in the field notes all the conditions relevant to the field sampling activities (i.e. weather conditions, sampling methods and procedures, chain of custody, etc.) These too, should be discussed in greater detail in the inspection report.

Sample collection and analytical activities must follow proper chain of custody procedures as described in EPA Order 5360.1, which is EPA's guidance for a Quality Assurance Program. The Chain-of-Custody requirements can also be found in *American Society for Testing and Materials (ASTM) Methods, Standard Methods for Water and Wastewater,* and *Test Methods for Evaluating Solid Waste, Physical/Chemical Methods* (EPA Publication SW-846 [Third Edition and amended updates]). Chain-of-custody documentation should also be included as an attachment to the inspection report, and be part of the source file.

Upon receipt of the analytical results from the laboratory performing the analyses, the data should be included as an attachment to the inspection report and should be described and referenced within the final report. In short, all evidence collected should be included as an attachment to the final inspection report, when possible, and referenced appropriately within.

Another source of information to be included in the inspection report is pertinent statements made by facility representatives, whether taken from the inspector's field notes, a tape recording device, or written correspondence provided by a facility representative. This information should be properly referenced in the inspection report. When summarizing statements, indicate their author in the text

of the report: Mr. Smith of Company X replied that...; or According to Mr. Smith, ...; or Mr. Smith stated...; etc. Quotation marks are used only if great care was taken by the inspector to ensure that the statement being quoted is exactly what was said by the individual. Otherwise, the use of quotation marks is inappropriate and can damage the credibility of the report.

It is good practice when performing an inspection to request beforehand from the facility a facility diagram, map, plot plan or drawing representing the area of investigation for inclusion into the final inspection report. If the facility is unable to provide such, then the inspector may make his or her own facility diagram. It is important to include any diagram/drawing as an attachment to the final inspection report, and to reference it whenever it is relevant within the narrative text. It is also important to describe any changes made to the diagram, and to identify by whom the changes were made, and whether the drawing was to scale. Including a facility diagram as part of the final inspection report is an excellent way for the reader of the report to visualize the facility layout, operations and processes. Any visual aids such as diagrams, photographs or videotapes may serve to enhance and clarify issues during enforcement negotiations or litigation, if collected and utilized appropriately.

Documents obtained from a facility should be described in the relevant portions of the final inspection report, referenced, and included as an attachment to the final report. It is important to note that all documents, even those later determined to be irrelevant to the inspection outcome, should still be made an attachment to the final inspection report and/or included in the agency source file.

2.5 Time Frames for Inspection Report Completion

Inspectors should make every attempt to complete final inspection reports as expeditiously as possible after the inspection has been completed. Details can begin to fade with time, and questions can arise regarding locations, events, observations etc., even when the utmost care has been taken by the inspector to record copious field notes.

Completing inspection reports in a timely manner (as described in EPA's "Timely and Appropriate Enforcement," attached as Appendix C) increases the agency's ability to work promptly with the responsible party to compel a return to compliance. Timely completion of inspection reports also enhances DEQ's ability to: 1) increase the options/alternatives available for resolution, 2) return the facility to compliance in a manner which decreases the imminent or potential for harm to human health and the environment, 3) halt activities which result in continuing violations, and 4) decrease the perception of government inefficiency. Failure to complete timely inspection reports may lead to a backlog of work and can delay timely violation determinations and associated enforcement processes. Unnecessarily extending the enforcement process may decrease opportunities for resolving the violations and may even bring the 2-year statute of limitations into play.

Certain extenuating circumstances may delay completion of inspection reports: resource reallocation, late or incomplete laboratory results, failure to obtain requested information in a timely manner, etc. Typically in these cases, the Program Manager(s) and/or Enforcement Coordinator(s) will assist the inspector however possible to help minimize the delay.

2.6 Inspection Report Review and Finalization Process

Once the draft inspection report has been completed by the inspector, s/he should thoroughly proofread the report for technical and grammatical accuracy. The inspector should ask him/herself if the report answers the basic questions: who, what, when, where, why and how? If not, the inspector must continue to revise the draft report until all these questions are adequately answered and supported by factual evidence. If more than one inspector participated in an inspection, then s/he should have an opportunity to review and comment on the draft final inspection report to ensure technical accuracy prior to its release.

Once the draft report has been reviewed in its entirety by the lead inspector, the report will then be forwarded to the Enforcement Coordinator or his or her designee for review. The Enforcement Coordinator will review the report within the timeframes established in the *EPA Timeliness Guidelines* and provide written comments, if any, and then send the draft back to the lead inspector for necessary revisions. The inspector will then revise the inspection report by researching, discussing and resolving any outstanding concerns the Environmental Enforcement Manager may have, and subsequently finalize the inspection report. The original copy of the final inspection report will then be signed and dated by the inspector(s) and entered into the DEQ source file, and/or routed for data entry, if necessary. A copy of the final report will be sent to the facility. Once finalized, all draft copies of the inspection report will be destroyed in accordance with the DEQ Policy Memorandum: Policy for Records Management (Appendix A). If enforcement action is recommended, a copy of the inspection report may also be forwarded to the Attorney General's office as an attachment to the Enforcement Referral Package.

2.7 Enforcement Recommendation/Justification Process

Upon finalization of the inspection report, the lead inspector is responsible for recommending to the Regional Office Manager the compliance status of the facility based on his/her evaluation of the information collected through the inspection process. The lead inspector will identify the violation(s), describe the factual evidence supporting the violation(s) and recommend appropriate enforcement action. The Regional Office Manager is then responsible for summarizing all apparent or potential violations, recommending the compliance status of the facility, and documenting any recommendation for enforcement in a separate memorandum to the Program Enforcement Coordinator, or his or her designee. This process will be discussed further in Section 4 of this manual.

Section 3: Violation Determination, Compliance Status Evaluation and Referral Processes

3.1 Introduction: From Inspection to Determination

This section of the manual discusses how to collect and evaluate information needed to make a violation determination, define the types of violations, prepare an enforcement referral package, and calculate penalties.

Routine inspections are those scheduled in an EPA-approved work plan. Inspections may also be performed in response to complaints from citizens. While complaint response is not in itself an enforcemen action, it may subject the facility to enforcement actions depending on the findings of the complaint inspector. When in vestigation of complaints indicates the possibility of violations, the investigation, determination and referral are handled in the same ways detailed in this chapter.

Once the inspection is completed and the results are documented in a final inspection report, determining the compliance status of the facility is the next logical step. The determination as to whether a violation(s) exists is based on the observations and information collected by the inspector. The inspector may utilize the following steps in determining the compliance status of the facility.

3.2 Collection of Background Information

The first step involves the collection of accurate, complete, and verifiable information. Prior to the inspection being performed, the inspector should have obtained preliminary information from the DEQ program source files to review the facility's compliance history.

The inspector should also consult with appropriate DEQ State Program and Regional Office personnel to seek additional information perhaps not contained in the source file.

To gain a broader perspective, inspectors should also consider contacting other relevant local, state and federal agencies, such as Health District offices, Idaho Department of Water Resources, Occupational Safety and Health Administration or EPA, etc. to discuss and obtain any pertinent background information from their files.

Inspectors should also review facility records contained in the source file (record reviews or compliance reviews). These records include paperwork from a facility required to submit information as a result of a permit condition, consent order condition, or similar reporting requirement. A facility is often required to submit information or reports on a scheduled basis--for example biannually, annually, semi-annually, quarterly, monthly etc. The information submitted can include financial, monitoring, operating, emission or groundwater monitoring data, etc. The identification of a discrepancy may alert the inspector to potential and/or apparent violation(s).

Another way for DEQ to acquire information about a facility is through the use of an "Information Order," as found at IDAPA 58.01.01.122, *Rules for the Control of Air Pollution in Idaho*. This rule allows DEQ to request any and all information directly or indirectly pertaining to air emissions or

potential air emissions from a source. A determination of whether the source is in compliance with the rules, federal regulations, and/or permit requirements can then be made based on information submitted by the facility in response to the Order. Generally, the Air Quality Office contemplates issuance of a 122 letter (Order) when the information needed is not available through other means. The need for and anticipated use of the requested information must be established in the Order, and prior to issuance of the Order.

3.3 Collection of Information During the Investigation

The most critical step of the violation determination process begins while the inspection or record/compliance review is being performed. During an inspection, the inspector is making observations, some of which may immediately alert him/her to a discrepancy or potential violation. Based upon these observations, the inspector must then take extra care to gather supporting evidence to confirm that a discrepancy or potential violation actually exists.

This can be accomplished by interviewing facility representatives and employees to obtain crucial information that may not exist elsewhere (i.e. a long-time employee's historical perspective). The inspector must document the name of the individual interviewed, his/her job title or position, and the individual's responsibilities as an employee. Additionally, the inspector should query the individual as to the type of training he/she received, to attempt to evaluate his/her understanding of the requirements as they pertain to the activities for which he/she is responsible. In instances where it appears there is noncompliance, taking exceptionally meticulous and accurate field notes when obtaining information from statements made to the inspector by facility employees may be a key to the case during enforcement negotiations or litigation.

Often, interviewing more than one individual is necessary to get the whole picture or a broader perspective. A pitfall to this approach is that it can often lead to the gathering of conflicting information, which may then require the collection of still more evidence to clarify new issues and arrive at an accurate record. When interviewing individuals at a facility it is crucial for the inspector to determine whether he/she is talking to the person who has the most knowledge of or is responsible for the areas for which the information is being solicited.

Subsequent to the physical inspection of the facility, the next logical step in the process is to review the relevant facility paperwork or records to substantiate the inspector's direct observations and statements made by individuals at the facility. If a gap or an inconsistency in the information collected is identified, the inspector should contact the appropriate facility representative and make a verbal and written request for the information necessary to accurately characterize the situation in question. Failure to request additional information or seek clarification of existing information can result in an inspector making an inaccurate determination. An inspector should never make assumptions or inferences regarding potential noncompliance without first having taken every precaution to obtain the additional supporting information necessary to verify a finding. In order to obtain complete and accurate information it is critical to request copies of all data that support the findings of (non)compliance, for reference purposes and for possible attachment to the final report.

3.4 Referrals to/from Other Enforcement Agencies

Information relating to potential violations at a facility may also arrive in the form of referrals from other local, state or federal agencies, such as Health Districts, the Idaho Fish and Game Department, the Occupational Safety and Health Administration, and EPA. Likewise, it is important that DEQ personnel know about other agencies' authorities in order to coordinate with or refer cases to these agencies. The following is a partial list of agencies with environmental responsibilities that may need to be informed of DEQ activities. Cases may also be referred to them for further action under their authorities.

LOCAL AGENCIES (City and County):

Rural Fire Districts
Fire Marshall/Inspector
Planning and Zoning Commissions
Owners/Operators of Solid Waste Landfill
Commissioners
Law Enforcement Officials
Prosecutors
Local Emergency Response Commission (LERC)

STATE AGENCIES:

Dept. of Agriculture
Dept. of Fish and Game
Dept. of Law Enforcemen
Dept. of Transportation
Dept. of Lands
Dept. of Parks & Recreation
Dept. of Water Resources
Dept. of Labor and Industrial Services
Health Districts

FEDERAL:

U.S. Environmental Protection Agency (EPA), including the Idaho Operations Office which is located in Boise, Idaho.
U.S. Forest Service
U.S. Bureau of Land Managemen
U.S. Dept. of Agriculture
U.S. Department of Energy
U.S. Corp of Engineers
U.S. Bureau of Reclamation
U.S. Dept. of Transportation
U.S. Attorney General's Office
U.S. Dept. of Justice

U.S. Geological Survey
Farm Home Administration (FHA)
Occupational Safety and Health Administration
Mine Safety and Health Administration

OTHER:

Idaho Indian Tribes

3.5 Extenuating Circumstances

Determining whether extenuating circumstances exist at the time of the inspection or record review may have a significant effect on an inspector's ability to collect complete and accurate information, which in turn can affect the violation determination. Extenuating circumstances can include: 1) the facility being shut down or non-operational due to annual maintenance activities; 2) the unavailability of a responsible company official to answer questions during the inspection; 3) equipment malfunction; and 4) the facility being in the process of modifying a permit condition, or awaiting a review or response from DEQ on a particular technical or regulatory issue. Many other extenuating circumstances may arise, and it is important to take these into consideration when performing the inspection and to adjust the focus of the inspection accordingly, when possible. In any event, the inspector should obtain as much relevant information as can reasonably be collected before concluding the inspection.

A general rule of thumb to keep in mind: Collect documentation proportionate to the potential seriousness of the discrepancy or apparent violation observed. The agency will be more likely to pursue formal enforcement based on more serious violations; therefore, additional information may be of value in supporting a charge.

3.6 Drawing Conclusions from Information Collected - Violation Determination

Often the most difficult step of the process is evaluating all the information collected to draw conclusions about the compliance status of the facility. This process begins by determining whether any exemptions to the regulatory requirements might apply. If exemptions apply, the inspector must state in the final written record that they were taken into consideration as part of the evaluation.

The basic approach to making a violation determination involves using the language in a rule and/or permit condition (regulatory requirement) as a guide to determine whether the information collected demonstrates that a violation has occurred. The inspector should, at this point, have a good understanding of what regulatory requirement was violated, and how. An explanation of how the operations observed or reviewed at the facility/source fail to comply with the regulatory requirement is required in the final inspection report. A record of how visual observations and other evidence collected demonstrate noncompliance with the regulatory requirement must also be included. Based on all the factual information collected, the inspector should be able to identify the apparent cause of the violation.

The inspector should base his determination on current program interpretations, regulatory guidance, policies and procedures. Each violation must be reviewed on its own merits, with case-specific considerations taken into account. Remember to take any extenuating circumstances into consideration as well in making the determination. While it is important to identify the specifics of a case, it is equally important to assure program consistency by performing a comparison of each violation with other similar violations cited in past program actions.

3.7 Types of Violations

Compliance determinations must be based solely on the factual information collected. The use of DEQ policies and procedures should be relied on whenever possible as guidance in the violation determination process. This helps to avoid any perception that decisions are made in an arbitrary or capricious manner. Each of the various media programs has a guidance document which gives direction on how the program should proceed with an enforcement action once violations have been identified.

For example, the hazardous waste enforcement program utilizes EPA's *Hazardous Waste Civil Enforcement Response Policy* dated March 15, 1996 (ERP), as guidance to assure consistent and appropriate enforcement actions (see Appendix D). The hazardous waste ERP provides a general framework for identifying violations and violators of concern and describing timely and appropriate enforcement responses for noncompliant actions.

Compliance classifications are based on an analysis of the facility's overall compliance with RCRA, including recalcitrant behavior or prior history of noncompliance. The ERP establishes two categories of violators: Significant Non-Compliers (SNC) and Secondary Violators (SV). The selection of the appropriate enforcement action may be based on the violator's classificatio n designation.

Significant Non-Compliers (SNCs) are those facilities which, through their actions, have caused actual exposures, or increased the substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or other RCRA statutory or regulatory requirement. The Water Quality Program also identifies SNCs through the use of the Safe Drinking Water Information System (SDWIS) database. The Air Quality Program's analogous term to SNC is High Priority Violator (HPV).

Secondary Violators (SVs) are those violators which do not meet the criteria listed above for SNCs. Secondary Violators are typically first-time violators and/or violators who pose little or no threat of exposure to hazardous waste or hazardous waste constituents. SVs should not have a history of recalcitrant or non-compliant conduct. Violations associated with an SV should be amenable to swift correction and prompt return to compliance with all applicable rules and regulations.

The air and water programs have guidance documents similar to the EPA *Hazardous Waste Civil Enforcement Response Policy*. The Water Quality Program uses the *Water Quality Administrative Penalty Guidance Document* (see Appendix E) to categorize violations and assess penalties. The air

enforcement program utilizes the 2000 *Air Quality Administrative Penalty Policy* (attached as Appendix F of this manual).

The final step of the violation determination process includes determining or estimating the period of noncompliance. This is not possible in all cases, but an effort to make this determination should be made regardless. In determining if a violation is to be defined as discrete or continuing, one factor to consider is the responsible party's ability to fix the problem and the timeliness of such resolution. Violations can be categorized into four distinct groups, defined as follows:

1. Discrete - refers to a violation that has been observed to have occurred as the result of an individual, distinct or separate circumstance. Basically it is a one-time occurence. It is not observed or documented to be ongoing. In many cases, a discrete violation is one which was observed to have occurred during the window of time covered by the inspection.

   For example, a drum of hazardous waste is not labeled as such, even though the facility has a standard operating procedure which provides for the labeling of drums and has instructed employees as to the proper labeling procedure. Additionally the facility corrects the drum labeling violation during the course of the inspection.

   Another example of a discrete violation is a single visible or fugitive dust emission violation, or a brief open-burning event, at a facility with an air permit.

2. Continuing - refers to a violation that has been observed or documented to have occurred as the result of an on-going, persistent or enduring circumstance or situation. Continuing violations are generally observed or documented as on-going occurrences over an extended period of time, which can be further substantiated by records.

   An example of a continuing violation may be one in which a facility fails to perform an air emission source test(s) as required in a permit by a certain date. The facility fails to perform the test, thus remaining in a continuing state of demonstrated noncompliance until the permit requirement has been met.

   Operating an emission source without required control equipment may also be another example of a continuing violation. Other examples may include: failure to obtain a permit prior to construction of an air pollution source, and then continuing to operate the facility without the permit; or conducting an emission test which demonstrates noncompliance with an emission limit, but then continuing to operate the facility in violation of the limit without having first corrected the problem causing the exceedance and demonstrating compliance through a new test.

3. Recalcitrant - refers to a violation which has been noted during a previous recent inspection or review. The violation might be characterized as recalcitrant based on the inspector's knowledge of identical violations identified during a previous inspection or review of the facility. A recalcitrant violation can be either discrete or continuing, but clearly is one which has been repeatedly identified and brought to the attention of the facility.

   For example, a violation has been previously brought to the attention of facility representatives, with the intent being that it would promptly be resolved, yet little or no action was taken to resolve the violation. Upon reinspection of the facility, the same violation is again identified.

4. Criminal - refers to a facility having knowingly or intentionally violated environmental laws. In the event it appears criminal violations exist, DEQ will refer the enforcement action to the Attorney General's office for prosecution of misdemeanor charges, or to EPA for further criminal investigation and/or prosecution of the violation under federal felony statues. In either case, the DEQ program will remain involved with the case to the extent requested.

3.8 Compliance Status: Determination of Appropriate Enforcement Recommendation

Once the inspector has determined that a violation has apparently occurred, the next step is to determine the appropriate course of action to recommend. The choices can include but are not limited to:

1) issuing a Warning Letter;
2) issuing a Notice of Violation;
3) referring the case to the Attorney General's Office for civil or criminal enforcement; or
4) referring the case to other relevant local, state or federal enforcement agencies for enforcement consideration.

One important factor to consider in making a determination is the magnitude or seriousness of the violation(s), based on their impact on human health and/or the environment, individually and then collectively. The seriousness or magnitude of a violation is often referred to as the "gravity" of the violation. Gravity considerations include: 1) weighing the severity of individual violations based on their actual or potential for harm to human health and the environment; 2) the degree to which the violation deviates from the regulatory requirement; and 3) the significance of compliance with the requirement in achieving the goal of the statute or regulation. To weigh the seriousness or gravity of hazardous waste violations, for example, certain terms have been assigned to identify violation categories:

MAJOR: Major violations deviate substantially from the regulatory requirement, and create imminent or potential danger to human health or the environment. Major violations usually result in larger penalties.

MODERATE: Moderate violations occur when the responsible party deviates significantly from most but not all of the regulatory requirements, thereby resulting in a less significant potential for danger to human health or the environment. Moderate violations usually result in smaller penalties.

MINOR: Minor violations occur when the responsible party deviates only somewhat from the regulatory requirements. Little or no potential danger exists to human health and the environment as a result of minor violations and the minimum penalty is imposed.

The Air Program and Water Quality Program use similar terms to categorize violations and assess penalties. For details, refer to the individual programs' penalty policies in Appendices E-G.

Other factors to consider when determining the appropriate enforcement recommendation include:

1) the amount and toxicity of the pollutant or substance that was released, emitted, discharged, treated, disposed, or improperly managed;
2) the sensitivity of the receptors and/or the environment impacted or potentially impacted by the release, emission, discharge, treatment, disposal or improper management;
3) the responsible party's compliance with other safety and environmental requirements;
4) the compliance history of the responsible party and their responsiveness to correcting previous violations;
5) the responsiveness and/or cooperation exhibited by the responsible party in correcting discrepancies during the inspection or shortly thereafter, constituting a "good faith effort to comply;"
6) whether circumstances beyond the control of the responsible party exist, such as unpredictable accidents or acts of God;
7) the degree of negligence exhibited by the responsible party;
8) the economic benefit realized by the responsible party while operating in noncompliance with the requirement, thus resulting in an unfair advantage over competitors;
9) the degree of support for, commitment to, and implementation of environmental programs by the owner/operator/management of the facility (i.e. training opportunities, designated environmental staff, required resources available, environmental programs in place, good housekeeping, and good recordkeeping systems).

3.9 Preparation of the Enforcement Referral Package

Once the draft inspection report is final the inspector is responsible for putting together a referral package, also known as the referral recommendation. The referral package contains the inspector's recommendation to the appropriate person--usually the Enforcement Coordinator, Program Manager or Attorney General's Office--as to whether formal administrative enforcement action, civil or criminal referrals are warranted.

The referral package should be conspicuously labeled Enforcement Confidential" and may be treated as a confidential attorney-client communication during a pending enforcement action. Thus it may be exempt from disclosure under Idaho Code Section 9-340(22) as an investigatory record. However, once the enforcement action is resolved, it is unlikely that the information contained in the referral package would remain confidential.

The essential ingredients of the referral package are:

1. the **inspection report**;
2. a **list of violations** alleged, along with evidence; and
3. the inspector's **recommendation** as to what type of further enforcement action, if any, is warranted.

The referral package should contain a narrative summary including, among other things, the following information:

- date of inspection,
- names of all persons (agency and facility) involved in the inspection,
- background information and/or a chronology of events,
- discussion of complex technical or regulatory issues,
- discussion of any extenuating circumstances,
- previous compliance history,
- the degree of cooperativeness exhibited by the facility,
- inspector's statement as to the overall compliance status of the facility, and
- any other relevant information which supports the inspector's overall recommendation.

The referral package also contains a narrative summary of the violation(s) which may be alleged in a Warning Letter (WL) or Notice of Violation (NOV). The narrative must state the factual evidence needed to support the alleged violation(s). This section should also include the inspector's determination, along with supporting facts, of whether this is a one-time, continuing or recalcitrant violation.

The primary purpose of the referral package is to document the inspector's findings and recommendation for initiating the appropriate enforcement response. This is accomplished in the section entitled "Proposed Action" (See Figur 3.1). Under this section numerous options are listed; the inspector need only check the appropriate box with his/her recommended action, and follow with a brief narrative justification for the recommendation.

The referral package may include any necessary documents as attachments, including inspection reports and associated evidence, penalty calculations, justifications, written correspondence, phone logs, e-mails, memoranda, etc., which were generated as part of the enforcement case development process. A copy of the CAR shall be placed in the DEQ facility/source file marked confidential.

The inspector should complete the referral recommendation package within the time frame specified by the timeliness policies applicable to the particular program. For general guidance, refer to the EPA Office of Enforcement and Compliance Assurance's *The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations*. Section six of the T&A manual, "Timely and Appropriate Enforcement," is attached as Appendix C of this document.

Figure 3.1 Referral Package Memorandum, Standard Format

Date

*****ENFORCEMENT CONFIDENTIAL*****

M E M O R A N D U M

TO: Name, Program Administrator

THROUGH: Name, Enforcement Coordinator

FROM: Name, Science Officer/Compliance Analyst (Inspector)

RE: **Enforcement Referral for** [Facility Name, location]

Summary of Inspection Report:

Brief narrative summary should include the following information:

- date of the inspection or compliance review;
- names, titles, and affiliation of persons involved;
- type of inspection [complaint, site inspection, compliance review, visible emission observation, sampling, multi-media etc.];
- brief chronology of events;
- identification and discussion of complex technical or regulatory issues;
- identification and discussion of extenuating circumstances;
- discussion of previous compliance history of the facility;
- general statement of the overall compliance status of the facility;
- general statement as to the degree of cooperation exhibited by facility;
- recommendation and/or justification for enforcement action;
- any other relevant information (e.g., penalty calculation and justification information).

List of Alleged Violations/Assessment of Compliance Status:

Based on observations identified in the [date of completed inspection report] inspection report, the alleged violations are as follows:

1.a. Cite permit condition, rule, regulation or statute violated.

1.b. Narrative of factual evidence to support the alleged violation including reference to the inspection report or attachments as needed.

1.c. State whether this is a one-time, continuing or a recalcitrant violation. Repeat the above format for all alleged violations. [Use the format and proposed language that would routinely be used in the NOV so that the language can be transcribed directly into the draft NOV.]

Based on the above, I recommend the following appropriate action:

[ ] Compliance Notification Letter be issued, therefore no action be initiated, or notify of resolution to previous enforcement action [Optional]
[ ] Issuance of a Warning Letter
[ ] Issuance of a Notice of Violation
[ ] Initiation of a Consent Order without prior NOV issuance
[ ] Initiation of a Voluntary Consent Order without prior issuance of an NOV
[ ] Referral to Attorney General's Office for Civil Action
[ ] Referral for Criminal Action
[ ] Referral to U.S. Environmental Protection Agency for appropriate action
[ ] Referral to other local, state, federal agency for appropriate action
[ ] Other

Additional justification: **[optional]**

cc: Enforcement-Confidential section of DEQ facility/source file

3.10 Penalty Determination

Determination of penalties is perhaps one of the most challenging and time-consuming activities in the development of an enforcement action. To assist inspectors in the penalty calculation and assessment process, the State Program Offices within DEQ have developed penalty policy documents (discussed below). The basic philosophy of penalty assessment in these documents derives from EPA's 1984 *Policy on Civil Penalties*, and can be summarized simply. The goals of penalty assessment are:

1) Deterrence: The penalty assessed must not only recover any economic benefit gained by the violator, but also impose an additional monetary or other burden commensurate with the gravity of the violation(s).

2) Fair and Equitable Treatment of the Regulated Community: Extenuating or aggravating circumstances must be taken into account. Thus adjustments may be made to the penalty for such factors as degree of wilfullness, history of (non)compliance, degree of cooperation, ability to pay, etc.

3) Swift Resolution of Environmental Problems: This goal is pursued by retaining the flexibility to reduce penalties when the violator has remedied or begun to remedy the problem(s), thus providing incentives for swift remediation. Conversely, disincentives to delaying the resolution process can be provided in the form of per-day fines for continuing violations.

The statutory authority which allows DEQ to assess civil penalties for violation of air quality, water quality and azardous waste laws is contained in the Environmental Protection Health Act (EPHA) and the Hazardous Waste Management Act (HWMA). Idaho Code, Section 39-4414 of the HWMA provides DEQ the authority to assess civil penalties of up to ten thousand dollars ($10,000) per day of violation. Idaho Code, Sections 39-107 and 39-117, of the EPHA also provide the statutor y framework for the assessment and collection of penalties of up to ten thousand dollars ($10,000) per violation or one thousand dollars ($1,000) per each day of a continuing violation, whichever is greater.

In response to the statutory authorities afforded to DEQ, the State Programs have developed the *Water Quality Administrative Penalty Guidance Document* (Appendix E), the *Air Quality Administrative Penalty Policy* (Appendix F), and the *HWMA Civil Penalty Policy* (Appendix G). All of these policies are being implemented today in the calculation and assessment of penalties in environmental enforcement actions. Each employs some variation of the EPA matrix (gravity + economic benefit - adjustment factors).

The *Air Quality Administrative Penalty Policy* designates continuing violations into three different classifications with associated penalty ranges. The policy also identifies the penalty range for separate violations, and provides guidelines for the assessment of penalties on a case-by-case basis. The guidelines include considerations such as: 1) history of (non)compliance, 2) willingness to cooperate, 3) circumstances beyond the control of the party in violation, and 4) severity of the violation.

The *Water Quality Administrative Penalty Guidance Document* divides violations into "single" and "continuing," then employs a penalty assessment matrix based on 1) potential for harm to human

health and the environment, and 2) extent of deviation from the statutory or regulatory requirement or the permit condition. Adjustment factors are then applied, based on the violator's history of (non)compliance, the degree of willfulness and/or negligence of the violator, and other factors.

The *HWMA Civil Penalty Policy* for hazardous waste violations provides the guidelines for 1) determining the gravity-based penalty, 2) considering the economic benefit of noncompliance, and 3) adjusting the penalty for special circumstances. The gravity-based component of a penalty is based on the seriousness of the violation. The penalty matrix takes into account the extent of deviation from the regulatory or statutory requirement and the potential for harm (ranging from minor to major), and is calculated for each violation. The matrix includes a recommended penalty range for each of the nine cells in the matrix.

These policies provide guidelines for assessing multiple and per-day violations at a facility. They also outline the criteria for considering the economic benefit realized by a facility during the time of noncompliance in calculating the penalty amount.

Each of the policies provides guidelines for the adjustment of a penalty based on extenuating or special circumstances. Considerations to be taken into account are:

- the violator's good faith effort to comply with the requirements,
- the degree of willfulness and/or negligence on the part of the violator,
- the history of noncompliance (typically an upward adjustment for recalcitrant behavior),
- violator's ability to pay, and
- any unique or unanticipated factors.

Each policy document contains a worksheet to assist the inspector in calculating the assessed penalty, document the justification for the penalty chosen, and provide documentation for the penalty adjustments that may occur after settlement negotiations.

3.11 Penalty Justifications

When calculating penalties for environmental violations the inspector must document his or her rationale for the determination of the assessed penalty amount. This documentation may be recorded directly on the penalty calculation worksheet. The penalty justification should be included as part of the Enforcement Referral package.

Typically, it is the responsibility of the Enforcement Coordinator of the program to review the inspector's penalty determination justification and to ensure that the penalty is appropriate, fair and consistent with penalties assessed for violations at other facilities with similar circumstances; or, that the penalty assessment is fully justified based on the supporting information for the violations.

If penalties are adjusted, typically downward following enforcement negotiations and settlement, a justification for the adjustment should be documented and included in the DEQ facility/source file.

Section 4: Administrative Enforcement Action

4.1 Introduction: Purpose of Administrative Enforcement Action

This section of the manual discusses in detail the administrative enforcement process as administered and implemented by DEQ for the enforcement programs. Whenever the Administrator or the Administrator's designee determines that any person is in violation of any provision of the EPHA, HWMA, or rules, permits, or orders issued or promulgated pursuant to the EPHA or HWMA, s/he may commence either an administrative or civil enforcement action.

The legislative intent of the administrative enforcement process found in the HWMA/EPHA was to avoid costly litigation, both in terms of money and resources, for both the regulated community and the DEQ. Historically, civil cases have rarely gone to trial. They are often settled late in the litigation process after a considerable investment has been incurred by all parties.

By implementing the administrative enforcement process, DEQ is able to maintain some control of the settlement negotiations, rather than relinquishing control to the court to set deadlines, parameters on negotiations, penalty amounts, etc. Another advantage to avoiding the civil process is that the courts can be unfamiliar with environmental issues and considerations. Hence, the agency can spend significant resources educating the courts. The DEQ and the responsible party (defendants) can further benefit by being able to exchange reasonable proposals for resolution, rather than having the court impose directives for resolution.

Since industry is typically concerned with public perception and community relations, industry often prefers the less formal administrative process, which can allow for earlier negotiation of settlements, rather than the more costly and longer civil process.

Additional benefits of administrative actions to both the regulated community and the DEQ are the opportunity for the parties to meet face-to-face to get the issues out on the table, thus providing the parties opportunity for a free-flowing dialog and an exchange of ideas, as well as identifying each party's needs. This increases the likelihood of effective negotiation and resolution.

4.2 Factors that Distinguish Administrative Enforcement from Civil and Criminal Enforcement

Administrative enforcement is a more informal process, therefore typically less costly in terms of technical staff and attorney resources invested. A resolution can often be reached more quickly than through the judicial system. Again, the agency maintains more control of the outcome through the negotiation process. Negotiations often are more technically driven than legally driven, thus demanding less attorney involvement. Information is likely to be obtained more easily from both parties, thus allowing for a free flow of ideas. The administrative process allows the DEQ to use regulatory flexibility when warranted. Settlements through the informal administrative enforcement process typically result in a lower negotiated penalty.

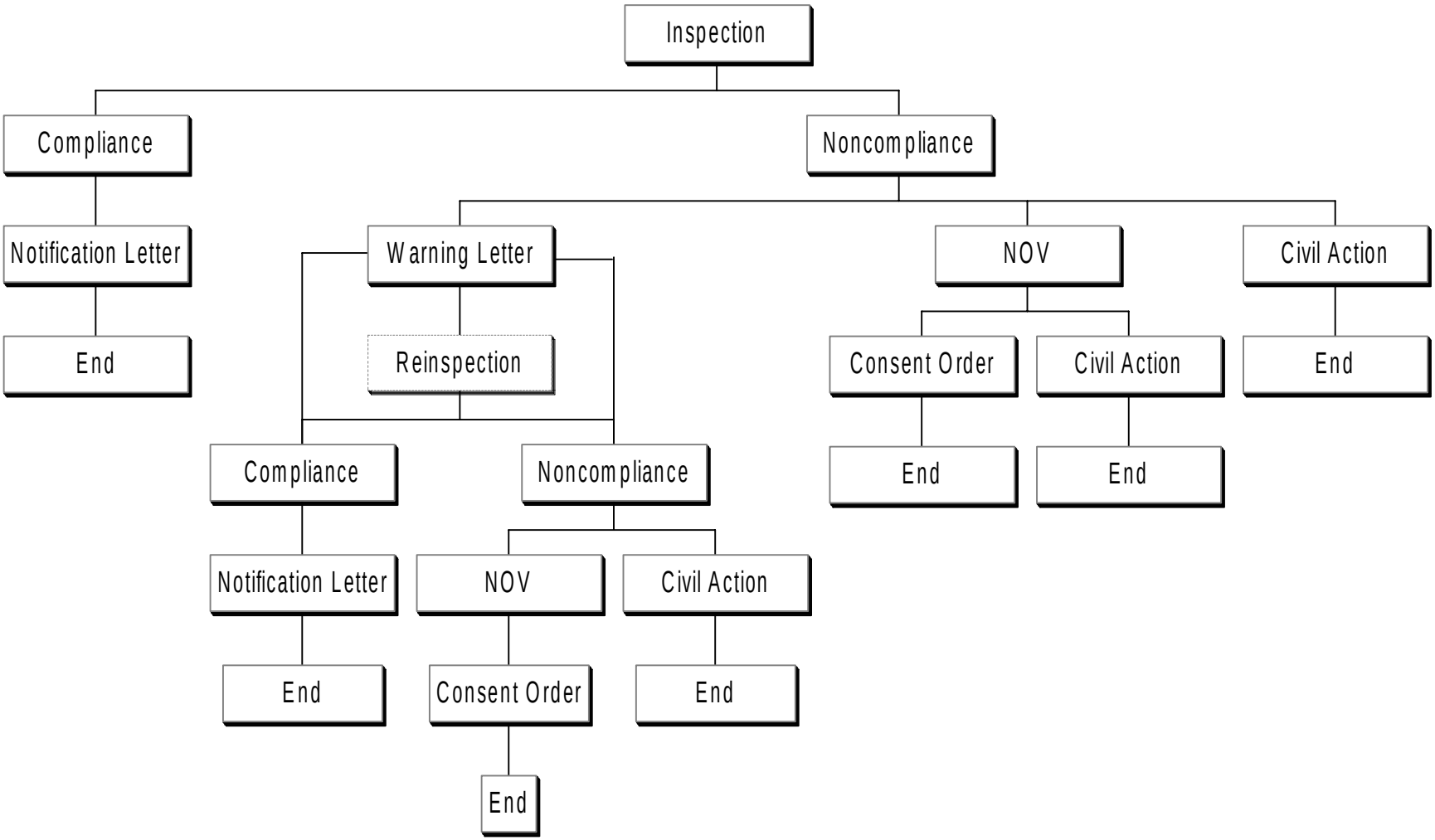
Civil enforcement, on the other hand, is a more formal process; all the rules of the judicial system are exercised. Therefore, the parties have less direct control over the outcome. The negotiations may tend to primarily involve attorneys, with less technical staff involvement. Obviously the formal route through the courts leads to the accumulation of additional costs to the parties, including perhaps higher penalties for the defendant, attorney fees and other costs to be recovered. Both parties are bound to the rules of the courts, such as the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence.

The criminal enforcement process is even more complex in terms of adhering to the rules of the court and hence can be more costly to all parties involved. The Idaho Criminal Rules and Idaho Rules of Evidence apply.

In general, the more formal the process the more time, money and resources must be committed by all parties to resolve the issues. Hence, it is often beneficial for all parties to attempt to work through the more informal administrative enforcement process to achieve successful resolution, before other options are considered.

The general components of the administrative enforcement process include issuance of Compliance Notification Letters, Warning Letters, and Notices of Violation, and negotiation of Consent Orders. The development and implementation of each of these components is illustrated in Figure 4.1 below.

Figure 4.1 Administrative Enforcement Process Overview



4.3 Compliance Notification Letters

The purpose of the Compliance Notification Letter is to notify the owner/operator of a facility that the inspection or compliance review resulted in no findings of violations or concerns, hence no enforcement action will be initiated. While there is no standard language or format for the Compliance Notification Letter, the key components may, among other things, include the following:

1) acknowledgment that an inspection or compliance review of the facility was performed on a specified date;
2) notification that the facility was found to be in compliance with the relevant rules, regulations, standards, permit or Consent Order conditions;
3) discussion of any relevant potential issues or concerns which may affect the facility's compliance status in the future;
4) attachment of relevant educational information and/or correspondence.

No enforcement action will be initiated, since the facility is in compliance.

4.4 Termination Letter and Return to Compliance Letter

Other types of compliance notification include the Return to Compliance Letter (RTC) and the Termination Letter. The two are similar in that both notify the owner/operator of a facility that administrative enforcement actions against it have ceased. (Civil enforcement actions must be terminated by the court.) The RTC welcomes the facility back to the compliant community by providing formal notification that all violations noted in the Warning Letter (see 4.5 below) have been resolved. The Termination Letter is typically used to signal fulfillment of the terms of a Settlement Agreement or Consent Order, which contains language specifying terms of its "termination." The RTC or Termination Letter will typically include:

1) acknowledgment that an inspection or compliance review of the facility was performed on a specified date;
2) notification that the facility has fully completed and satisfied the requirements of a Warning Letter, Consent Order, Consent Judgment or Decree and is determined to be in compliance with the relevant rules, regulations, and/or permit requirements;
3) discussion of any relevant potential issues or concerns which may affect the facility's compliance status in the future;
4) attachment of relevant educational information and/or correspondence;

All administrative enforcement actions will terminate upon issuing the RTC or Termination Letter.

4.5 Issuance of a Warning Letter

According to both the Environmental Protection and Health Act (EPHA) and the Hazardous Waste Management Act (HWMA), the administrative enforcement process begins with the issuance of the Notice of Violation. All actions prior to this, such as issuance of warning letters, would not technically be part of administrative enforcement. However, under various agreements between EPA

and the state Board of Health and Welfare--for instance, the Compliance Assurance Agreement and the Compliance Enforcement Strategy document--the warning letter is considered part of the administrative enforcement process. Thus its status is somewhat ambiguous.

What is certain is that the warning letter can be an effective tool in achieving the primary goal of enforcement: to gain compliance. Thus it is discussed here as a measure that may, if heeded, make further enforcement proceedings unnecessary. If unheeded, however, it often presages them.

The Warning Letter serves two purposes: 1) to identify to the responsible party the apparent deficiencies/violations that were observed as a result of the inspection/review process; and 2) to request corrective measures be implemented within a given time frame to mitigate the deficiencies/violations.

Warning Letters are generally reserved for addressing minor or low-priority discrete violations and do not assess a penalty. Typically, the violations addressed in a Warning Letter can be resolved expeditiously with relatively low costs to industry and minimal oversight by DEQ. Issuance of a Warning Letter is a relatively informal tool for gaining compliance without resorting to a Notice of Violation or other proceeding.

4.6 Warning Letter Processing and Routing Procedure

The internal DEQ process for development, review and issuance of a Warning Letter is diagrammed in Figure 4.2 of this manual. The inspectors are responsible for drafting the Warning Letter, which is then reviewed by the Regional Office Administrator (RA) or his or her designee. Upon approval of the Warning Letter by the RA, the letter is then issued to the registered agent and owner and/or operator of the facility via certified mail. A response from the facility must be received by DEQ within fifteen days from the date the letter was received by the facility. Typically, the facility should submit in writing a response to the Warning Letter which includes specific evidence and information confirming that the violations cited in the Warning Letter have been resolved.

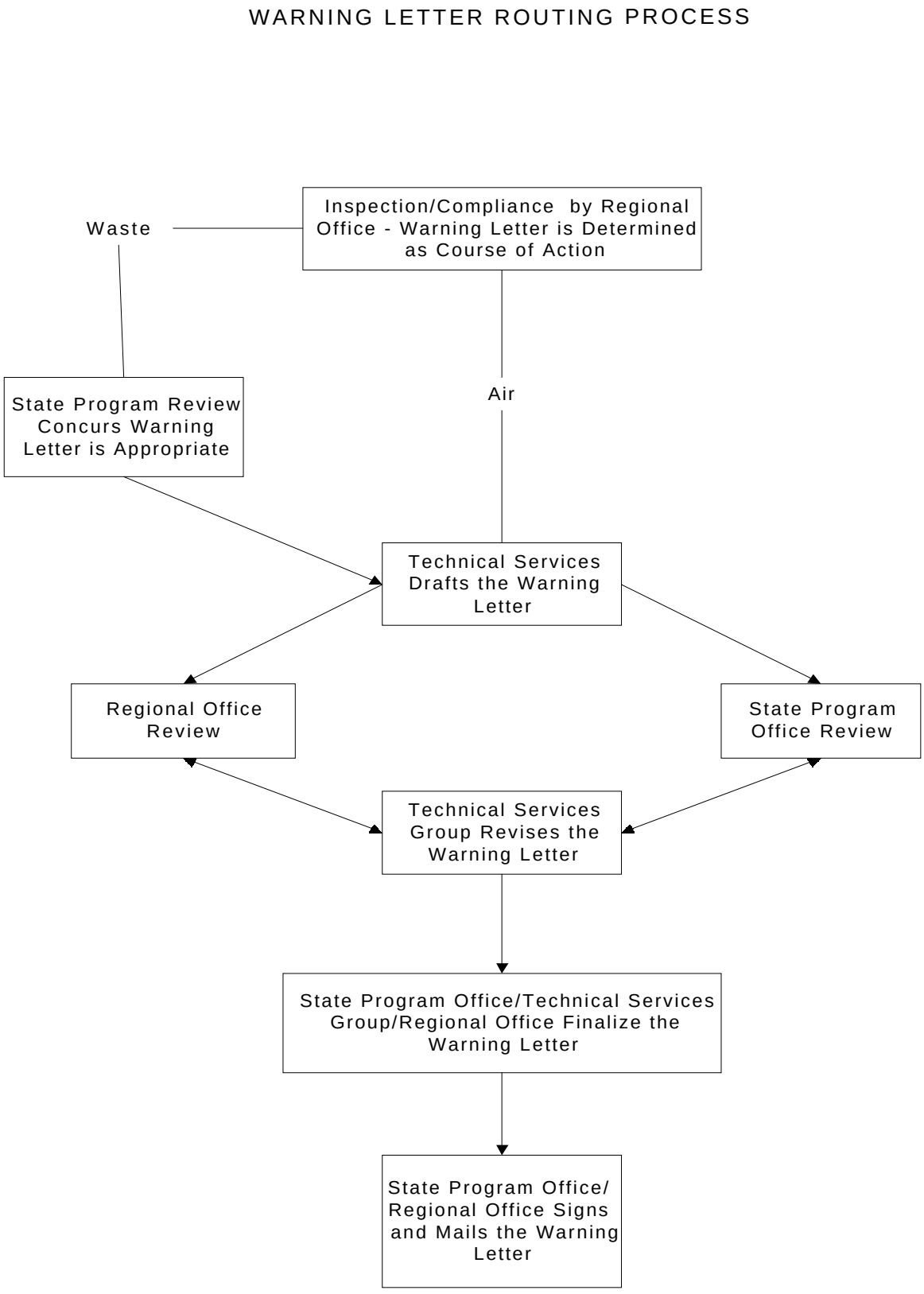
Upon DEQ's receipt of the response letter from the facility, the inspector is required to review the submittal to determine whether compliance with the regulatory requirements has been achieved. If the inspector determines that the facility has satisfactorily remedied the violations cited in the Warning Letter, the inspector may recommend a Return to Compliance (RTC) be issued. The inspector may decide to confirm resolution of the violations by reinspecting the facility. In this case, an RTC would only be issued upon completion of the inspection verifying compliance.

An RTC is a letter issued primarily by the Regional Offices which indicates that concerns relating to the relevant violations identified by DEQ during an inspection or compliance review have been satisfactorily addressed. The RTC terminates the administrative enforcement process related to the issuance of a Warning Letter. A copy of the RTC is maintained in the DEQ Regional and State Program Office source file to demonstrate DEQ's closure of the enforcement action. The appropriate information is then entered into the relevant enforcement tracking databases.

If the facility fails to respond either in writing or verbally to the Warning Letter, the inspector may attempt to contact and work with the facility to resolve the violation(s). If the facility fails to

cooperate with the inspector or inadequately responds to the Warning Letter, the inspector may recommend to the State Program enforcement office that an NOV be issued and penalties assessed for the violation(s) cited in the Warning Letter. For an example of a standard Warning Letter form and an example draft Warning Letter, see Figure H.1 and Figure H.2, respectively, in Appendix H of this manual.

Figure 4.2 Warning Letter Process Flow Diagram



4.7 Nature and Purpose of a Notice of Violation (NOV)

An NOV is one of DEQ's formal legal means of informing responsible persons or parties that apparent violations have been observed. The key elements of an NOV, in the sequence they appear, are:

1) notification to the facility of the apparent violations (by citing the legal provisions violated) observed by DEQ as a result of an inspection or a compliance review;

2) assessment of a civil penalty, typically for each violation; and

3) an invitation to negotiate a Consent Order (CO) designed to prescribe the terms and conditions the company must follow to return the facility to compliance through resolution of the violation(s).

Pursuant to Idaho Code §§ 39-4413(1)(a) of HWMA and 39-108(3)(a) of EPHA, a Notice of Violation shall identify the alleged violation(s) with specificity; shall specify each provision of the act, rule, regulation, permit or order that has been violated; and shall state the amount of civil penalty claimed for each violation. The Notice of Violation shall inform the party involved of an opportunity to confer with the Director or the Director's designee (DEQ) in a compliance conference concerning the alleged violation(s). A written response may be required within fifteen (15) days of receipt of the Notice of Violation by the party to whom it is directed, requesting a compliance conference. The main purpose of a response to the NOV is to establish a mutually acceptable date, time and place for the compliance conference.

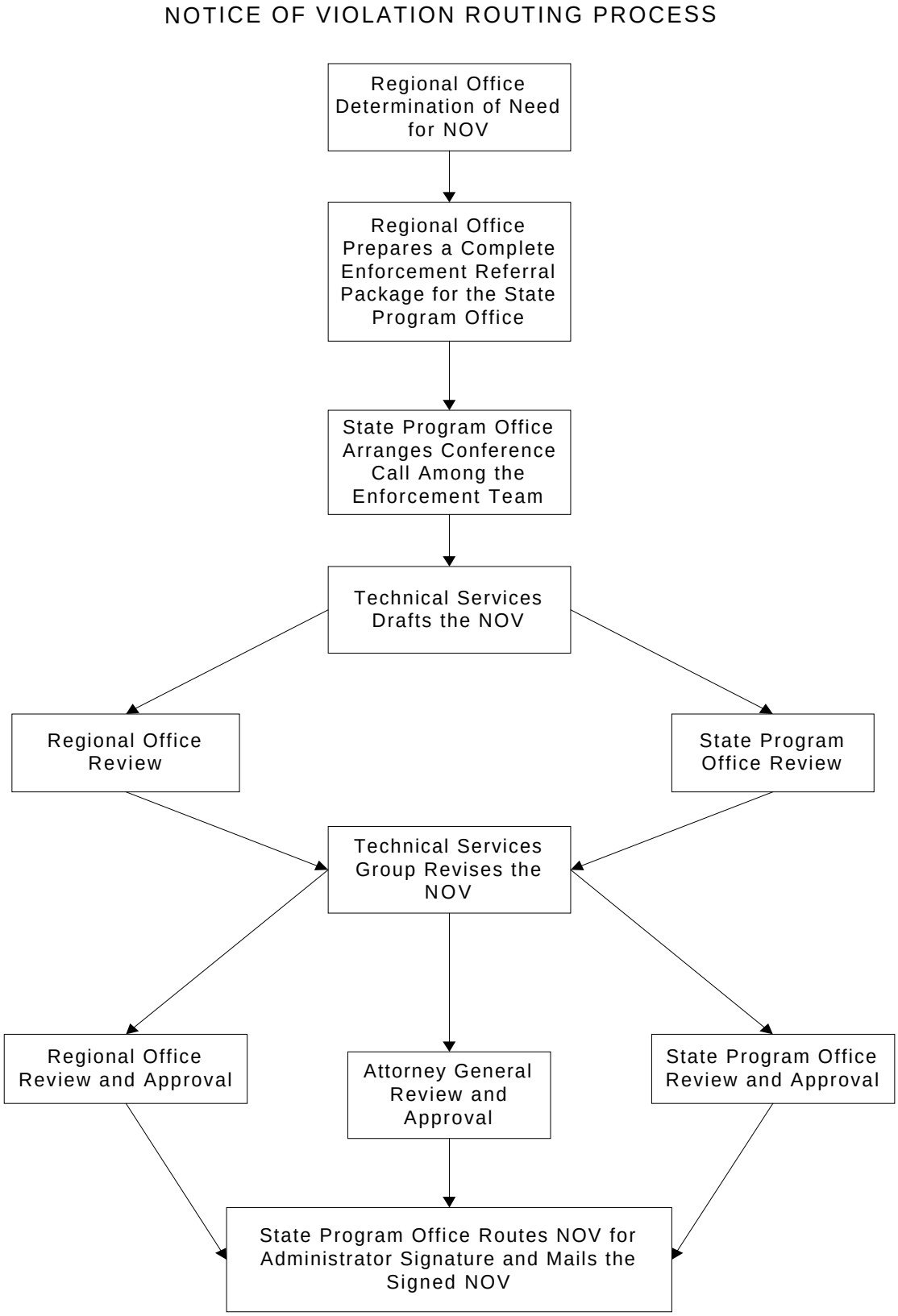
Issuance of an NOV is generally reserved for addressing the more serious, egregious, on-going, or recalcitrant violations of environmental regulations. Typically these types of violations require more complex and more costly corrective measures than violations cited in a Warning Letter, as well as lengthy time frames necessary to return the facility to compliance. An NOV may, besides the more serious types of violations, address additional minor or moderate violations identified as part of an inspection or compliance review.

The NOV, in all its stages of preparation, is considered an "Enforcement Confidential" document. It can be released to the public only after it is signed by the DEQ Administrator and received by the facility, pursuant to the Idaho Public Information Law found at Idaho Code, Sections 9-337 to 9-349.

The internal process for the development of a Notice of Violation is shown in Figure 4.3 below.

The NOV is generally issued to the company and to the registered agent at the business's and agent's address(es). When the company does not have a registered agent the NOV is issued to the individual who has been identified by DEQ as being responsible for the business, most often the owner and/or operator. In cases where the owner and/or operator of the business is not the owner of the real property and is leasing from another party the property on which the facility operates, DEQ will

Figure 4.3 Notice of Violation (NOV) Routing Diagram



provide the owner of the real property a copy of the NOV. This practice notifies the property owner of the environmental violations on his property and of his potential liability.

The NOV consists of a brief summary of DEQ's primary evidence for the allegation of the violations. Generally this includes a specific reference to the inspection, compliance review, or other methods used by DEQ to discover the alleged violation(s). The summary also includes the citation of DEQ's statutory authority to issue the NOV.

The main body of the NOV has the alleged violations listed in numerical order, each with a specific citation of the provision violated (permit condition, rule, standard, etc.). Also included is reference to DEQ's evidence supporting the allegation that a violation occurred, followed by a description of what actions were taken (or not taken) that constituted a violation.

Following each violation is a penalty assessment for that individual violation, as determined by the appropriate DEQ program penalty policy. Following the last violation noted in the body of the NOV the total assessed penalty amount is specified. This is followed by language describing the proposed timetable for response by the facility to the NOV. The final step before issuing the NOV is obtaining the signature of the DEQ Administrator, complete with the effective date of issuance.

Refer to Figures H.3-H.6 in Appendix H for examples of an NOV and associated documents required for issuance of an NOV.

4.8 Notice of Violation Routing and Review Process

Once the Enforcement Referral Package is sent from the Regional Office to the State Program Office, the NOV routing and review process will proceed as follows.

Regional Office Responsibilities - The Regional Office (RO) is responsible for determining whether violations noted during a compliance inspection or record review (for example, review of annual reports submitted by a facility) warrant an enforcement action within the requirements and/or constraints of the State Program Office. Assistance from Program personnel will be given to the RO to make that determination. If it is determined that an enforcement action is warranted, the RO will submit a complete enforcement referral package (see section 3.9 of this manual) to the appropriate State Program Office.

State Office Responsibilities - Upon receipt of the referral package, the State Program Office will arrange for a telephone conference call with the team (State Program Office lead, regional lead and Technical Services lead assigned to the case). Additionally, at this point, a Deputy Attorney General will be assigned to the case, but participation in the phone call by the Deputy AG will be optional. The phone call will allow the team to discuss and determine strategies. If it is decided there are sufficient grounds to proceed, the referral package will be given to the Technical Services team member to prepare the first draft of the Notice of Violation.

Multimedia Enforcement Actions - Under certain circumstances, an investigation may reveal violations involving more than one program office. In this instance, the Regional Office will refer the violations to the Program Office that initiated the investigation. For example, if a review of a Land

Application of Wastewater annual report or inspection detects both land application and hazardous waste violations, the referral would be sent to the state Water Quality Program Office. The Water Quality Program Office would become the lead state program office, and would be responsible for ensuring the state Waste Management and Remediation Program Office remains informed and involved in the case.

Actions Involving Site Remediation - If an enforcement action will involve site remediation, the action will be referred to the state Waste Management and Remediation Program Office or the state Water Quality Program Office. If the enforcement action occurs at a facility that has a Water Quality Program permit, the enforcement action will be referred to and managed by the state Water Quality Program Office. All other enforcement actions involving remediation will be referred to and managed by the state Waste Management and Remediation Program Office.

Technical Services Drafts Notice of Violation - Following the telephone conference call, the Technica Services team member will produce the first draft of the Notice of Violation. The Technical Services team member will identify any complex or controversial issues connected with the draft NOV and identify them in an e-mail to team members. The draft NOV is provided electronically to the State Program Office and the Regional Office team member. The first draft will not be provided to the assigned Deputy Attorney General, unless the Deputy AG specifically requests to review it.

Review of First Draft of Notice of Violation - The team will review and comment on the draft The team is expected to comment electronically, and copy all team members with their comments.

Technical Services Incorporation of Comments into the Final Draft - The Technical Services team member will incorporate all suggested changes into the draft. If comments conflict, the Technical Services team member will use professional judgment to determine which comment to incorporate, subject to approval by the Program or Regional Office. Conflicts or complex issues addressed in the final draft shall be identified in the e-mail transmitting the final draft to all team members. At this point, the Deputy Attorney General assigned to the case will review the Notice of Violation.

State Program Office Conducts Conference Call - If the State Program Office lead determines significant issues remain, or if the Deputy Attorney General's review identifies significant issues, the State Program Office team member will conduct a conference call with the team members. The purpose of the conference call will be to reach consensus on the wording of the final Notice of Violation. If consensus cannot be reached, the State Program Office team member will determine the final wording in conjunction with the Deputy Attorney General assigned to the case.

Technical S rvices Finalizes Notice of Violation - The Technical Services team member finalizes the Notice of Violation by incorporating the agreed-to changes into the NOV. The final Notice of Violation, along with the cover letter and copies, is provided to the State Program Office team member for routing for signature.

State Program Office Routes for Signature - The State Program Office team member routes the NOV for signature. The signed Notice of Violation is returned to the State Program Office team

member and mailed to the facility. The Technical Services clerical person who prepared the final NOV will distribute copies to all team members.

State Program Office Schedules Compliance Conference - The State Program Office team member will be the point of contact when the facility requests a compliance conference. The State Program Office team member will contact all team members and determine a date and location for the compliance conference. Normally conferences will take place in the Regional Offices unless otherwise agreed to. The Deputy Attorney General team member will generally participate in the compliance conference only if the facility has legal counsel present during the conference. Once the details are finalized, the State Program Office team member will contact all team members by e-mail with the time and location of the compliance conference.

State Program Office Conducts Compliance Conference - The State Program Office team member is the lead negotiator at the compliance conference. The inspector of the facility, whether it be the Technical Services or Regional Office team member, will provide background, clarification, and direction for understanding the nature and extent of the violations. The Technical Services team member is responsible for taking notes and recording the agreements made in the compliance conference. The results of the compliance conference will be documented in a file note to the facility's enforcement file, with copies provided to all team members. The Regional Office team member provides background concerning the inspection or record review which led to the issuance of the Notice of Violation.

Facility Refuses Compliance Conference - In the event that the facility refuses to schedule or attend a compliance conference, the State Program Office is required to determine the next step. At this point the case may be referred to the Attorney General's Office for filing of a court action to enforce payment of the penalties specified in the NOV.

4.9 Compliance Conference

The purpose of a compliance conference is to provide the opportunity for both parties to meet to discuss the apparent violations cited in the Notice of Violation (NOV). Pursuant to Idaho Code §§ 39-4413(1)(c) of HWMA and 39-108(3)(a)(ii) of EPHA, the compliance conference provides an opportunity for the recipient of a Notice of Violation to explain the circumstances of the alleged violation and, where appropriate, to present a proposal for remedying damage caused by the alleged violation and for assuring future compliance. If the recipient and DEQ agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a Consent Order formalizing their agreement. The Consent Order may include a provision for payment of any agreed civil penalty and a scheduled time frame for compliance.

Once the recipient receives the NOV, he/she has fifteen (15) days in which to contact DEQ to request and schedule a compliance conference. An attempt should be made to schedule the compliance conference within twenty (20) days, as specified in both HWMA and the EPHA. The recipient contacts the Enforcement Coordinator by phone or in writing to request the compliance conference. Once the compliance conference date is scheduled, a confirmation letter should be sent by the Enforcement Coordinator confirming the date, location, and any special considerations that have been made. Often the recipient may not wish to travel to the State Program Office in Boise to attend the

compliance conference. When this is the case, the Enforcement Coordinator should offer to hold the meeting at the DEQ regional office nearest the facility. Compliance conferences also may be held via telephone conference calls.

When scheduling a compliance conference it is important to find out whether the recipient will be represented by an attorney at the conference. If this is the case, DEQ's policy is to also be represented by an attorney from the Attorney General's Office. It is important to notify the recipient of this policy at the time the compliance conference is being scheduled. It is also recommended that the Enforcement Coordinator inform the recipient that the conference is their opportunity to present whatever additional information may be needed to resolve the alleged violations. Advising the recipient to be prepared to present their case and any good faith efforts they may have taken to resolve the noncompliance issues since the time of the inspection is strongly encouraged. The DEQ inspector(s) who observed the noncompliance should be present to provide background information and clarification, and to take notes for the file record of the compliance conference.

Prior to the compliance conference, a pre-conference meeting should be held between the inspector(s), the Enforcement Coordinator(s), Regional Office personnel, and/or the Program Manager. A Deputy Attorney from the Attorney General's Office should attempt to attend, even if the alleged violator has indicated they will not have legal representation at the compliance conference. The purpose of the pre-meeting is to discuss all critical aspects of the enforcement action, to determine the goals of the compliance conference, and to establish the enforcement "bottom line" for negotiation purposes. The pre-meeting also allows the inspector(s) the opportunity to recount the circumstances of the inspection and to discuss in greater detail, if necessary, the technical or regulatory aspects supporting the alleged violations. The meeting also serves as a briefing for the Enforcement Coordinator (EC), who is usually the lead negotiator during the compliance conference, and can provide the EC additional information such as the justification for the proposed penalty, the past history of the alleged violator, and any actions which may need to be taken to return the violator to compliance. Often during pre-meetings various negotiation strategies are discussed in anticipation of the recipient's response to the Notice of Violation and the assessed penalties.

The compliance conference begins with the introduction of individuals present at the meeting and the passing by DEQ of a sign-in sheet. The EC generally takes the lead and explains that the purpose of the compliance conference is to provide the alleged violator the opportunity to explain any circumstances surrounding the alleged violations. It is further explained that the purpose of the meeting is to identify, discuss and negotiate terms and conditions of a Consent Order which will result in resolution of the alleged violations cited in the NOV. Also the compliance conference is used to explain that the negotiation process will result in an agreement on the final civil penalty.

Typically issues are discussed during the conference in the order they are cited in the NOV. A role of the inspector during the compliance conference is to take notes, in preparation for preparing a file note documenting the alleged violator's response to the NOV and any proposed resolutions. The inspector may also participate, as requested by the Enforcement Coordinator, by defending his/her factual information collected and observations made during the inspection, and by providing any technical or regulatory information needed to clarify the issues.

The role of the Deputy Attorney General at the compliance conference tends to vary. If the recipient's attorney presents their case, typically the Deputy AG will present DEQ's case. On some occasions the discussions may be more technical in nature, in which case attorneys from both sides tend to take a back seat to DEQ personnel and company officials. Each compliance conference presents unique situations which must be dealt with as they arise.

A compliance conference may last a few hours or a few days, depending on the number of alleged violations and the complexity of the issues involved. If, however, it appears the alleged violator is not willing to enter into a Consent Order or is not negotiating in good faith, and an agreement likely will not be reached within one hundred eighty (180) days from the date of the compliance conference, DEQ may elect to pursue civil action in district court to compel compliance. If the alleged violator appears to be negotiating in good faith and making satisfactory progress towards achieving compliance through resolution of the alleged violations, the EC may, at his or her discretion, continue to negotiate beyond the standard time frames. The one hundred and eighty day (180) maximum has been established by the Enforcement Programs as an outside limit to the negotiation process in an effort to establish what the Programs believe is a reasonable time frame for negotiation of a Consent Order. This one hundred and eighty (180) day limit is also consistent with EPA's April 15, 1996 Civil Enforcement Response Policy for the RCRA Program.

At some point during the compliance conference the EC may suggest the parties break from negotiations to caucus. The purpose of caucusing is to provide a brief period for the parties to discuss, in private, the issues before resuming the meeting and continuing to work towards settlement. At the conclusion of the compliance conference, the EC will summarize each of the parties' positions. Sometimes the alleged violator will need to provide additional information to DEQ to support his or her response to the NOV. The alleged violator may also have requested DEQ provide additional information. Time frames for submittal of additional information are agreed to. By the end of the compliance conference, the EC seeks to determine whether the alleged violator is willing to enter into a Consent Order agreement. If so, the EC explains that DEQ typically will initiate the drafting of the Consent Order, which will include the conditions agreed to by the parties during the compliance conference(s) and any changes which may affect the assessed penalty. The EC explains that the facility will have the opportunity to review, comment on, and factually correct the draft Consent Order. Negotiations may continue until both parties agree on the terms and conditions of the Consent Order within the one hundred and eighty (180) day period.

Should negotiations break down, the EC may refer the case to the Attorney General's Office for filing of a civil action (see Section 5 of this manual).

Following the compliance conference, the inspector is required to prepare a filenote which documents the issues as discussed during the compliance conference. The filenote contains or references all documents, photographs, and information provided to DEQ by the alleged violator during or following the compliance conference. The filenote should be reviewed by the EC for accuracy prior to inclusion into the agency source file. The filenote and any subsequent information obtained from the alleged violator then become the basis for the inspector to begin writing the draft Consent Order. If the inspector believes a filenote is not necessary, he/she may recommend so to the EC, who will make a final decision on whether or not the filenote is required.

4.10 Negotiation Skills

Negotiation has been defined as "the process used when human beings exchange ideas for the purpose of changing a relationship. The function of negotiation is not to change people's minds but to let them see the limitless possibilities for mutual satisfaction of needs that most life situations afford" (Nierenberg). Less idealistically, negotiation refers to the bargaining process between two or more parties with conflicting interests, with the goal of peacefully achieving a mutually acceptable agreement.

Preparation and planning prior to any negotiation is critical to its success. Preparation should begin before the parties even meet. In order to be a good negotiator, you must prepare yourself by evaluating your circumstances and developing an awareness of your needs. Subsequently, you must begin to develop an awareness of the needs of the other party and to do so, must look at the circumstances from the other's point of view. Negotiation can be viewed as problem-solving; for a negotiation to be successful, one must enter the negotiation with an open mind and understanding that there may be more than one alternative or solution available. If you go into a negotiation with only one answer to a problem, you may fail to consider the other party's perspective on the same problem and hence may not be able to achieve mutual agreement.

The keys to negotiation preparation are determining the *needs* and *desires* of your own party, and anticipating the needs and desires of the other party.

Needs are minimum baseline requirements; they are non-negotiable. From DEQ's perspective, we need to follow the law and, more generally, be faithful to our charge to protect human health and the environment. The alleged violator's needs may include avoiding bankruptcy, remaining competitive, and earning a reasonable profit. Of course, in cases where the needs of the parties are irreconcilable, negotiations break down, and the stronger party--in this case DEQ, backed by the government and its legal basis in the consent of the people--imposes its will.

Desires are things you would like to gain or achieve, but could sacrifice without compromising your survival or integrity. Desire is the realm of negotiation. Desires may be partially fulfilled, or deferred to a later date, when conditions are more favorable. Or one desire may be repressed so that another may be satisfied. While DEQ might want the violator to comply immediately with all relevant rules, as a practical matter we may be satisfied to set up a compliance schedule which gives the violator considerable lattitude. Similarly, we may reduce or eliminate desired penalties in exchange for a promise of quicker compliance or to avoid costly litigation.

Remember that you represent the people and environment of Idaho, and you should be their forceful advocate in any negotiation. At the same time, however, the alleged violator is also a tax-paying citizen or entity of the state, with a legitimate claim to fair treatment on the part of DEQ. It is important to avoid the attitude that negotiation is a competition which produces a winner and a loser. The best negotiation may not be the one in which you "win" the most concessions, but the one in which the sum total of happiness for both parties, as they walk away from the table, is greatest.

4.11 Nature and Purpose of the Consent Order

The Consent Order (CO) results from both parties coming together to negotiate mutually agreed-upon provisions which address corrective measures to mitigate violations. The CO also includes a schedule in which to complete certain activities and/or the terms for payment of a civil penalty. A negotiated CO is referred to as a "bilateral agreement" or a "mutually acceptable written agreement" because it has been negotiated and agreed to by both parties, rather than being a unilateral order imposed on one party by another.

Pursuant to Idaho Code § 39-108(3)(a)(iv) and (v) of the EPHA and § 39-4413(1)(c) and (d) of HWMA, if the recipient of an NOV and the Department agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a Consent Order formalizing their agreement. The CO may include a provision providing for payment of any agreed civil penalty. A CO shall be effective immediately upon signing by the violator and the Administrator of DEQ, and shall preclude any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the CO, the Department may seek and obtain, in any appropriate district court, specific performance of the CO and such other relief as authorized by EPHA and HWMA.

For examples of standard language for the Consent Order, and the transmittal letter for the signed CO, see Figures H.7-H.9 in Appendix H of this document.

4.12 Consent Order Routing and Review Process

Once DEQ and the alleged violator have come to a tentative agreement on resolving the problem(s), the production, routing and review of the Consent Order will proceed as follows. (See Figure 4.4 below, "Consent Order Routing Process," for a graphical depiction of the procedure.)

Team Members - In order to maintain efficiency and consistency, normally the same team that prepared the Notice of Violation will produce the ensuing Consent Order. The team will consist of one representative from each of the following: the State Program Office, the Regional Office, Technical Services and the Attorney General's Office.

Collection and Distribution of Documents - Often a facility will submit documents needed to prepare a Consent Order--e.g. SEP proposals, manifests, analytical data. The facility should be encouraged to submit these to the State Program Office, from which they will be distributed to other team members as needed.

First Draft of Consent Order - The Technical Services team member will draft the Consent Order based on the agreements reached in the Compliance Conference. The Technical Services team member will identify any complex or controversial issues connected with the draft Consent Order and identify them in an e-mail to the team. The draft Consent Order will be sent electronically to all team members, except for the Deputy Attorney General. The first draft Consent Order will only be sent to the Deputy Attorney General if specifically requested.

Review of First Draft of the Consent Order The team will review and comment on the draft. The team is encouraged to comment electronically, and copy all team members with their comments.

Technical Services Incorporation of Comments - The Technical Services team member will incorporate all suggested changes to the Consent Order. If comments conflict, the Technical Services team member will use professional judgment to determine which comment to incorporate, subject to approval by the State or Regional Office. Any conflict or complex issues addressed in the final draft will be identified in the e-mail transmitting the final draft to all team members. At this point, the Deputy Attorney General assigned to the case will review the Consent Order.

State Program Office Conducts Conference Call - The State Program Office Team member will conduct a conference call with the team if s/he determines significant conflicting issues remain, or if the Deputy Attorney General's review indicates a significant difference in approach. The purpose of the conference call will be to reach consensus on the wording of the final Consent Order. If consensus cannot be reached, the State Program Office team member will determine the final wording in conjunction with the Deputy Attorney General assigned to the case.

Technical Services Finalizes Consent Order - The Technical Services team member finalizes the Consent Order by incorporating the agreed-upon changes. The final Consent Order, along with the cover letter and copies, will be provided to the State Program Office team member.

State Program Office Mails Consent Order - The State Program Office team member mails the Consent Order. The State Program Office shall notify all team members of the date the Consent Order is mailed.

Comments/Changes Returned from the Facility - If the Consent Order is returned to the State Program Office unsigned, with a request for changes, the previously described process will be repeated from the "First Draft of the Consent Order" step.

Signed Consent Order Returned from the Facility - The State Program Office lead will notify the team members when s/he receives the signed Consent Order from the facility. The State Program Office will also notify the team members of the date the CO is effective. Additionally, the State Program Office will provide a copy of the signed Consent Order to the Regional Office team member.

Facility Refuses to Sign Consent Order - In the event that the facility refuses to sign the Consent Order, the State Program Office is required to determine the next step. At this point the case may be referred to the Attorney General's Office for filing of a civil complaint. Or it may be referred to EPA for enforcement under federal statutes. In any event, the State Program Office, with input from the Regional Office and Technical Services, must make this determination.

4.13 Compliance Schedules in the Consent Order

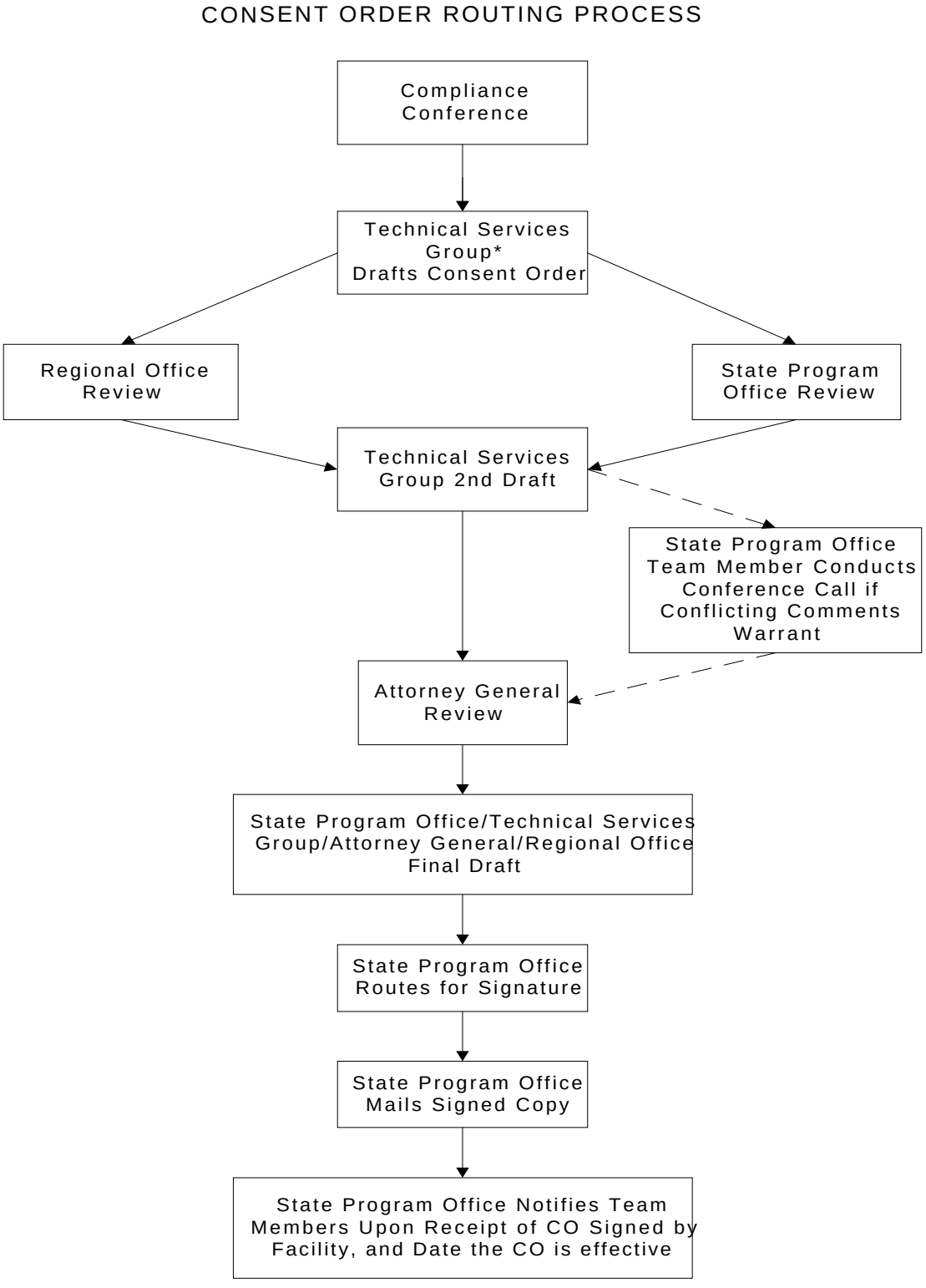
The goal in setting compliance schedules in Consent Orders is to ensure the responsible party demonstrates progress in achieving compliance. The State takes into consideration the amount of time necessary to achieve compliance when setting schedules. Time limits are discussed by DEQ and the respondent's representatives during the compliance conference and an agreed-upon schedule is

set. A very short time frame, such as five (5) days, may be set for submittal of documentation that must be developed by the respondent. A longer time period may be set for cleanup actions that need to be taken if such delayed action would not pose an imminent threat to human health, public safety, or the environment.

An extension to a compliance schedule in a CO may be granted by DEQ for justifiable reasons. In the written extension request, the responsible party (owner/operator) must document that the extension is necessary and negligence has not caused the delay. The DEQ will then perform a completeness review on all documents, plans, and/or procedures. If the documentation is not acceptable, a prompt revision is requested or the extension request may be denied.

Compliance schedules that are not met may be addressed by DEQ in several ways. The first response is for a DEQ representative to call the responsible party and inform him/her of the missed deadline. If the schedule is then met within a short time frame (typically 5-10 working days), it is unlikely that formal action will be taken. If the schedule is not met within the extended period, a Warning Letter may be sent explaining that the deadline was missed and must be met within (5) working days. If the responsible party does not respond to the Warning Letter, legal action may ensue.

Figure 4.4 Consent Order (CO) Routing Process



* If the responsible party makes changes to the draft Consent Order, the routing process from this point will be repeated.

If the parties cannot reach agreement on a Consent Order within sixty (60) days from receipt of the Notice of Violation, or if the recipient fails to request a compliance conference, DEQ, through the Attorney General's Office, may commence and prosecute a civil enforcement action in district court. Civil action is initiated through the use of a civil referral package to the Attorney General's Office from the Enforcement Coordinator requesting the preparation and filing of a civil complaint. Refer to Section 5 of this manual for specifics on referring a case for civil action.

4.14 Consent Orders Without Issuance of an NOV

Occasionally there are circumstances which may result in a Consent Order being negotiated without the prior issuance of a Warning Letter or Notice of Violation. The discretion to negotiate a Consent Order in these cases lies with the Enforcement Coordinator, the Regional Office, the Attorney General's Office and the Program Manager. The Consent Order may still provide for payment of penalties, stipulated penalties, performance of Supplemental Environmental Projects (SEPs), and/or other sanctions, even though penalties were not imposed first through use of an NOV.

Situations which warrant the immediate negotiation of a CO may occur when there is substantial immediate or potential imminent threat to human health or the environment. Negotiating a Consent Order directly without prior issuance of a Notice of Violation can result in corrective measures being agreed to which immediately address or stabilize the situation. This results in minimizing the threat to the public and the environment. In instances where the facility is willing to commit necessary resources to immediately address the noncompliance issues and where immediacy is an issue, retaining the flexibility to move directly to a negotiated Consent Order may prove effective in resolving the matter expeditiously and to the benefit of all.

4.15 Voluntary Consent Order (VCO) with No Preceding Administrative Enforcement

There are other circumstances which may result in a Consent Order being negotiated between DEQ and a responsible party in which no prior enforcement action has been taken. If a facility is expected to be cooperative, its compliance history is good, and the violations are simple and few, a Consent Order may be issued without a prior Notice of Violation. These are often referred to as "Voluntary" Consent Orders (VCO). VCOs may provide for payment of penalties, stipulated penalties, performance of Supplemental Environmental Projects (SEPs), and/or other sanctions. The decision to negotiate a VCO is made by the Regional Office, Attorney General's Office, the Enforcement Coordinator and the Program Manager.

Issuance of a VCO may be an attractive option under scenarios such as the following: A company performs environmental assessments or audits at its facilities which result in the discovery of violations. The company recognizes its responsibility to comply with environmental regulations and is committed to further investigating and mitigating the problems. In an instance where the company promptly notifies DEQ of the problem and of their intent to mitigate the problem, the company may request to enter into a VCO with DEQ to obtain oversight and a statement of resolution. In these cases DEQ likely would not have become aware of the problem through its normal course of

performing inspections or investigations, but rather became aware of it by voluntary disclosure from the facility. Hence, negotiating a Voluntary Consent Order with the company may be an option available to the parties which likely will result in mitigation of an environmental problem with a minimum investment of DEQ resources.

4.16 Termination of a Consent Order

Once the Consent Order has been signed by the Administrator of DEQ, the Consent Order is legally effective. The Regional Office with jurisdiction is then responsible for monitoring the facility's compliance with all of the conditions agreed to in the Consent Order, including payment of a civil penalty, if required. When the Regional Office has determined all of the conditions and terms of the CO have been completed in a manner satisfactory to DEQ, the Regional Office may recommend termination of the CO. Typically, Consent Orders include specific language on their termination. Often the language in the CO requires the facility to request of DEQ a letter acknowledging its termination.

The Termination Letter (TL) is sent to the owner/operator of the facility specifically stating that the terms and conditions of the Consent Order have been met, and that DEQ considers the facility's regulatory status as having "returned to compliance" with respect to the violations identified in the initial action. Once the TL has been sent to the facility the enforcement case is considered resolved and the case is closed. A copy of the TL is maintained in the DEQ source file as evidence that the case has been closed. Copies are distributed to the Attorney General's Office and the relevant DEQ Offices. Information is then entered into the appropriate enforcement tracking database, reflecting termination of the action.

4.17 Press Releases Regarding Consent Orders

Press releases may be issued regarding companies who have entered into Consent Order agreements with DEQ to demonstrate to the public the facility's commitment to return to compliance. In the past, the threat of notifying the public of facilities who are in noncompliance with environmental requirements has proven an effective deterrent. Our current practice, however, focuses more on positive reinforcement than on punishment. We do not generally use press releases, or their threat, as tactical tools in bargaining. DEQ normally issues press releases only on signed and effective Consent Orders, or on their successful termination.

4.18 Integrating Pollution Prevention into Enforcement

In 1990 Congress passed the Pollution Prevention Act, which defined the term "pollution prevention" as “any practice that reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal ...."

EPA further clarified the definition in a Memorandum from F. Henry Habicht II, Deputy Administrator, dated May 28, 1992; Subject: EPA Definition of "Pollution Prevention." The following are excerpts from this memo:

Under section 6602(b) of the Pollution Prevention Act of 1990, Congress established a national policy that

- pollution should be prevented or reduced at the source whenever feasible;

- pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible;

- pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible;

- disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

Pollution prevention means "source reduction" as defined under the Pollution Prevention Act and other practices that reduce or eliminate the creation of pollutants through:

- increased efficiency in the use of raw materials, energy, water or other resources, or

- protection of natural resources by conservation.

The Pollution Prevention Act defines "source reduction" to mean any practice which:

- reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

- reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants.

The term includes: equipment or technology modifications, process or procedure modifications, reformulations or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training or inventory control.....

> "Pollution prevention approaches can be applied to all pollution-generating activity, including those found in the energy, agriculture, governmental , consumer, as well as industrial sectors. The impairment of wetlands, ground water sources, and other critical resources constitutes pollution, and prevention practices may be essential for preserving these resources. Pollution Prevention applications may include conservation techniques and changes in management practices to prevent harm to sensitive ecosystems. Pollution prevention does not include practices that create new risks of concern.."

DEQ personnel promote pollution prevention-related activities to the regulated community while conducting inspections and providing technical assistance. DEQ personnel also discuss pollution prevention options, most often in negotiating conditions in Consent Orders. DEQ has negotiated pollution prevention projects as conditions in Consent Orders under the Supplemental Environmental Projects (SEP) guidelines.

While the assessment of civil penalties often serves as an effective deterrent for noncompliance, it does not assure future compliance, nor does it normally directly result in a decrease in pollution or waste. The goal of incorporating the pollution prevention approach into the enforcement process is to gain additional environmental benefit by reducing or eliminating pollution at its source. Incorporating pollution prevention opportunities within the enforcement process ideally moves the violator beyond compliance to a net positive environmental benefit. Utilizing the pollution prevention approach more often than not requires the development of innovative solutions to oftentimes complex technical and regulatory problems.

The following discussion is excerpted from the DEQ manual entitled *Incorporating Pollution Prevention into Enforcement, A Reference Manual*, and contains a summary of the laws and regulations that authorize or support the Department's use of pollution prevention in enforcement actions.

4.19 State Statutes and Regulations Regarding Pollution Prevention

4.19.1 Environmental Protection and Health Act (EPHA) - The EPHA gives the Director broad authority to regulate and also gives an alleged violator the ability to remedy the violation by methods that may be already available to the violator.

The statute supports this authority: the Director has authority to enforce rules, regulations, codes, and standards to prevent pollution, I.C. 39-105(2) & (3); an alleged violator of an environmental law shall have an opportunity to confer with the agency in a compliance conference and have the opportunity to explain the circumstances of the alleged violation and, where appropriate, "to present a proposal for remedying damage caused by the alleged violation and assuring future compliance," I.C. 39-108(3); and, the alleged violator will be given the opportunity to cooperate in the selection of terms for the compliance schedule order, I.C. 39-116.

Thus, the ability of the alleged violator to present proposals for remedy at the compliance conference may be the best opportunity for pollution prevention within the entire enforcement process.

4.19.2 Hazardous Waste Management Act (HWMA) - This state law gives the same opportunity as the EPHA for the alleged violator to present a proposal to remedy the alleged violation during the negotiation of terms in the compliance conference and consent order. I.C. 39-4413.

4.19.3 PCB Waste Disposal Act - This state law gives the same opportunity as the EPHA for the alleged violator to present a proposal for remedy of the alleged violation during the negotiation of terms in the compliance conference and consent order. I.C. 39-6901 *et seq*.

4.19.4 Hazardous Substances Emergency Response Act - DEQ's authority under this statute is typically limited to the recovery of costs. There are two features of this law that should be noted: first, the law expresses legislative intent that actions will be taken in state court, not federal court, for recovery of costs, I.C. 39-7102, and secondly, that "such other factors as the commission deems appropriate can be considered to decide whether to commence a cost recovery action," I.C. 39-7112. It is not clear whether pollution prevention projects can be incorporated into the cost recovery procedure. However, this would appear to be authorized through the EPHA.

4.20 Federal Statutes and Policy Regarding Pollution Prevention

Federal laws can provide direct causes of action for civil enforcement actions or provide regulations and standards for state administrative enforcement actions. For example, the standards set in RCRA are incorporated by reference into the state standards. In addition, many of the federal statutes explicitly state that the state standards cannot be less stringent than the federal standards. Therefore, federal law and policy is important for incorporating pollution prevention projects in enforcement actions.

4.20.1 Pollution Prevention Act of 1990 - This act is essentially non-regulatory and sets up programs including information dissemination, education, grants to states, and the "Source Reduction Clearinghouse." The Act sets out the guiding definition of pollution prevention. At the earliest opportunity, and certainly with the NOV or Warning Letter, an alleged violator should be given a clear definition of "pollution prevention."

4.20.2 Resource Conservation and Recovery Act (RCRA) - RCRA explicitly encourages the minimization of hazardous waste at its source, including "process substitution," along with other forms of non-source pollution abatement.

Manifest system. Certain generators of hazardous waste must follow a manifest system in designating hazardous waste for treatment, storage, or disposal. That manifest must certify that the generator has "a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable" and employ that method of treatment, storage, or disposal which is the "practicable method currently available to the generator which minimizes the present and future threat to human health and the environment." 42 U.S.C. 6922(a).

Thus, pollution prevention can be encouraged by assisting the generator with its "program in place" and assuring that the generator is using the best "practicable method currently available." However, there is no mandate beyond merely certifying that a program is in place. There are no substantive requirements of what that program must contain. In addition, since the generator is determining what is "economically practicable," there are no enforceable standards.

State authority. The state retains authority but cannot "impose any requirement less stringent than those authorized under this subtitle." 42 U.S.C. 6929. However, state requirements can be more stringent.

4.20.3 EPA Pollution Prevention Strategy - February 26, 1991 - Within the broad policy of pollution prevention, the following statements focus on enforcement:

"EPA believes that there is a continuing need for a strong regulatory and enforcement program under existing statutory authorities and that these provide further incentives to prevent pollution."

"EPA will also insure that its enforcement program seeks pollution prevention opportunities as part of ensuring compliance."

"EPA will encourage the inclusion of pollution prevention conditions in Agency enforcement settlements."

"EPA will use its prosecutorial discretion to negotiate enforceable prevention plans with facilities that have violated environmental law."

"Vigorous enforcement remains a primary tool for creating an incentive to reduce industrial pollution."

4.20.4 Toxic Substances Control Act - The administrator has authority to consider mitigating factors to modify penalties. However, there is no explicit authority for considering pollution prevention projects.

4.20.5 Clean Air Act - The administrator has authority to consider mitigating factors to modify penalties. However, there is no explicit authority for considering pollution prevention projects in enforcement actions. Pollution prevention was, however, emphasized in recent new amendments.

4.20.6 CERCLA - CERCLA is a remedial program; therefore, pollution prevention opportunities are best considered once penalties and cleanup costs are retrieved. Pollution prevention measures can be integral in the method of clean-up chosen.

4.20.7 EPCRA - There is no explicit authority for pollution prevention projects. Penalty provisions may provide some opportunities. See 42 U.S.C. 11,0045 & 11,0046.

For more specific information regarding the use of pollution prevention in the enforcement process, refer to *Incorporating Pollution Prevention into Enforcement, A Reference Manual*, Department of Environmental Quality, December, 1994.

4.21 Use of Supplemental Environmental Projects (SEP's)

During the process of negotiating a Consent Order it may become apparent that 1) the facility has corrected all of its violations, thus leaving only the issue of penalty payment to negotiate; or 2) the facility is willing to perform actions which are above and beyond the regulatory requirements; or 3) both parties agree there are extenuating circumstances which prevent the violation from being corrected. In these and other cases the facility may propose another environmentally beneficial activity, known as a Supplemental Environmental Project (SEP), be included in the terms of a Consent Order.

According to Idaho Code sections 39-108(5)(b) and 39-4414(1)(c), a SEP is a project:

1. The person is not otherwise required to perform, by any federal, state, or local law or regulation, or agreement; and

2. Which either

   A. Prevents pollution; or

   B. Reduces the amount of pollutants reaching the environment; or

   C. Contributes to public awareness of environmental matters; or

   D. Enhances the quality of the environment.

In addition, in its evaluation of a particular SEP proposal, the Legislature has concluded that DEQ may give a preference to those projects with an environmental benefit which:

1. Relates to the violation or the objectives of the underlying statute which was violated; or

2. Enhances the quality of the environment in the general geographic location where the violations occurred.

A SEP proposal shall contain as much detail as possible, and shall specifically include:

- a time frame, including specific dates, for the implementation of the SEP;
- the methods of recordkeeping which will be used to document the implementation of and expenditures expected to be included in performance of the SEP;
- a projected budget for the project, including a breakdown of costs for equipment, labor and capital;
- and identification of the nature and amount of any tax benefits to be claimed by the owner/operator as a result of implementation of the SEP.

Each proposed SEP will be evaluated by the Program Manager, the Enforcement Coordinator and the Attorney General's Office to ensure it meets the statutory requirements, as well as those of DEQ and EPA. An example of SEP language for inclusion into a Consent Order or settlement Agreement is set forth in Figure H-10 in Appendix H; this language can be modified as appropriate for any given SEP.

Once a SEP has been successfully negotiated and included as part of a Consent Order, the Regional Office is responsible for monitoring the completion of the SEP activities, as part of their requirement to monitor and ensure compliance with all terms and conditions agreed to in the Consent Order.

Additional information on supplemental environmental projects is provided in the DEQ guidance document attached as Appendix K, and in Idaho Code sections 39-108(5)(b) and 39-4414(1)(c).

4.22 Other Enforcement Options

Besides the administrative enforcement process described above, there are some additional tools, provided for under the authorities in the EPHA and HWMA, which may help to achieve compliance under certain circumstances.

4.22.1 Permit Modifications - Violations relating to a facility/source operating permit may sometimes be resolved through use of the permitting process. Occasionally operational changes at a facility will no longer meet the intent of the specific permit condition which governs this particular activity. Often modifications to the permit can "resolve" situations of noncompliance. In these cases the enforcement staff can coordinate the facility representatives and the DEQ permitting staff to negotiate needed modifications to the permit which may result in resolution of any related violations. Modifying permit conditions can be included as a condition in a Consent Order; or, depending on the circumstances of the case, the permit modification may, in itself, serve to satisfactorily resolve the violation. This option may be discussed during the compliance conference, based on the specifics of the case.

4.22.2 Referrals to Other Agencies - Another effective enforcement tool is referring information relating to noncompliance to other local/state/federal agencies who may also be responsible for ensuring compliance at the facility. An example would be referring to the local fire marshall information regarding the improper storage of hazardous materials in violation of the local fire code. One benefit of referrals to other agencies may be a joint resolution of concerns or violations through the company complying with other agencies' requirements. Another is the increased pressure brought to bear on the violator to comply.

4.22.3 Technical Assistance - Compliance with environmental requirements can also be achieved through education and outreach efforts. It has become a national and state priority to sharpen the focus on education of the regulated community through the use of technical assistance outreach efforts. The intent of such programs is to demonstrate that voluntary compliance can be achieved by industry through the educational efforts of the regulatory agencies.

Technical assistance efforts can include:

- performing site visits;
- in-person and telephone consultations, with follow-up as needed;
- development and distribution of "user friendly" regulatory guides and industry-specific pollution prevention information;
- participation in and sponsorship of workshops and seminars;
- working with trade groups;
- assistance with permitting requirements; and
- referrals to other local, state or federal agencies for relevant information.

A technical assistance site visit normally will consist of an evaluation of the facility's operating practices in light of environmental requirements. The facility owner/operator is informed of the outcome of the evaluation at the time of the visit and may be given an opportunity to correct any

discrepancies or problems within a given time frame. The facility is then informed that a follow-up inspection may be performed at a later date to re-assess compliance. If, at that time, the facility has not corrected problems and thus complied with the requirements, DEQ may pursue the appropriate enforcement action.

A Small Business Assistance Program has been implemented at DEQ to help guide small businesses through the regulatory maze of air-related environmental issues. For information specific to hazardous waste activities, refer to the draft *Hazardous Waste Technical Assistance Program Guidance Memorandum* found in Appendix I of this manual.

Section 5: Civil Enforcement Process

This section of the manual discusses the options available to DEQ for civil action, instances in which civil action is warranted, what constitutes a civil referral package and how to prepare the referral, an overview of the civil enforcement process, the respective roles of the inspector and the attorney during a civil action, and supplemental actions available in a civil enforcement action.

5.1 Authority to Commence Civil Enforcement Action

Pursuant to Idaho Code Section 39-108(3) of the EPHA and Section 39-4413(A)(3) of the HWMA, the administrator may initiate a civil enforcement action through the attorney general. A civil enforcement action must be commenced and prosecuted in the district court in and for the county in which the alleged violation(s) occurred, and may be brought against any person who is alleged to have violated any provision of the EPHA/HWMA, or any rule, permit or order which has become effective pursuant to these acts. Such action may be brought to compel compliance with any provision of these acts.

5.2 Instances in which Civil Action may be Selected

Civil actions are most often initiated when all reasonable attempts to resolve the violation(s) through the administrative enforcement process have been exhausted and the parties can not come to agreement.

It is important to note, however, that a civil action can be initiated without first pursuing matters through the administrative enforcement process. A civil action can be brought for violations of statutes, rules, orders or permits, usually when the violator has shown little or no willingness to resolve past violation(s) and/or pay penalties. The following are a few examples of circumstances under which DEQ may choose to bypass the administrative enforcement process and move directly to civil enforcement:

1. the violator fails to schedule a compliance conference within fifteen (15) days of receipt of the NOV, or after the expiration of a reasonable timeframe granted by DEQ;

2. the violator has demonstrated a history of non-compliant, recalcitrant behavior, has created unnecessary delays, is un-cooperative and generally does not negotiate in good faith to remedy the violation(s).

In the case of an emergency situation which presents imminent and substantial threat to human health and/or the environment, and there is no time to negotiate or the violator is not willing to negotiate an acceptable remedy, DEQ would likely pursue an injunction through the courts to stop the action creating the emergency. Although not an enforcement action in itself, the injunction may preceed an enforcement action.

5.3 Preparation of a Civil Referral

Requests for civil action are made through the enforcement case referral process through use of a Civil Referral Package (Referral). The Referral is prepared by the inspector, reviewed and approved at the various levels of management, and then routed to the Attorney General's Office. It is then the responsibility of the Attorney General's Office to confer with the appropriate DEQ personnel and the State Office of the Attorney General to make the determination as to filing a civil complaint in district court.

Generally, the Referral should be submitted to the Attorney General's Office within one year from the day the Department knew, or reasonably should have known, that the violation(s) existed.

Once the decision has been made to file a civil complaint, the Attorney General's Office needs access to the entire source file to proceed with litigation preparation. The contents of the actual referral package, however, vary depending on the program and the specific case. Figure 5.1, the judicial referral letter, is used to refer RCRA-related cases to the Attorney General's Office. The SWM/RPO does not make inspection reports, enforcement documents and the rest of the case file part of a formal Civil Referral Package. Air Quality does include these documents in the Package, and Figure 5.1 could serve as a cover letter for the Package if needed.

Figure 5.1 - Judicial Referral Letter

January 16, 2001

M E M O R A N D U M

TO: Doug Conde, Deputy Attorney General, Department of Environmental Quality

FROM: Hazardous Waste Science Officer, Air and Hazardous Waste Division

THROUGH: D. Michael Gregory, Hazardous Waste Enforcement Coordinator
State Waste Management and Remediation Program Office

Brian R. Monson, Manager
Hazardous Waste Program
State Waste Management and Remediation Program Office

SUBJECT: Judicial Referral for

In ___ , a complaint inspection was performed at the ___ facility located in ____ .

Based on the findings of the inspection, a Notice of Violation (NOV) was drafted and forwarded to (AG=S NAME HERE) for review. After ____ review, the NOV was issued to (FACILITY) in (CITY) . The ____ NOV alleged ___ violations of the RCRA/HWMA with an assessed penalty of . A draft Consent Order (CO) was presented to in . refused to sign the draft CO citing the penalty issue. A second draft CO was presented to in of . The draft CO mandated a penalty of . Again, was not agreeable to the terms of the draft CO.

This referral is being made to compel to enter into an agreement (CO) with the Department to resolve this case. Thus far, the Department has been unable to reach an agreement with through normal administrative procedures.

:tg c:\...\

cc: C. Stephen Allred, Director, Department of Environmental Quality
Katherine Kelly, Admin., State Waste Management and Remediation Program Office

The Civil Referral Package may contain the following elements. Each case is different, and the specific contents of the package will be dictated by the particular circumstances and issues the case presents.

1. Warning Against Disclosure - To demonstrate the attorney-client intent of this communication, the referral package should be in the form of a memorandum to the Attorney General's Office from the State Program Office. The top of the memo should be boldly labeled "CONFIDENTIAL" to warn against release of the memo to anyone outside the agency. This warning also establishes that the memo was requested (or is required) by the Attorney General to help support the litigation effort, and thus consists of confidential attorney work product and material prepared in anticipation of litigation.

2. Agency Contact Persons - This section of the referral package identifies the name(s) of the DEQ personnel who will serve as the primary contact(s) for the case. The primary contact is usually a person with in-depth firsthand knowledge of the facts of the case. This section provides a convenient reference for clerical to use when sending copies of correspondence and pleadings to the appropriate contacts within DEQ, as well as when providing the assigned attorneys with the identity of the contact persons who will approve settlement offers and coordinate DEQ's activities in the litigation. If DEQ provides a "cc" list, the attorney will be able to assure that all appropriate persons stay informed about events in the case.

3. Identification of any persons with knowledge of the case - This section provides the names and telephone numbers of all persons within and outside of DEQ who possess knowledge relevant to the case, and a summary of that knowledge. The attorneys can then contact, interview or depose them, as necessary. If any former DEQ employees were involved, this section should provide their phone numbers and addresses, as well.

4. List of Violations - This section includes a list of the rules and statutes, permit conditions, and/or Consent Order terms which may have been violated by the defendant. Each alleged violation should include a short description of its basis to provide the attorneys a starting point in analyzing the cause of action. If an NOV has previously been prepared it should be attached and included as part of the referral package.

5. List of potentially responsible parties - The most likely responsible persons, including the owner/operator of the facility, are included in this section. There may also be others whose actions/or lack of actions contributed to the violations at the facility. List the names, addresses and phone numbers of these individuals. The purpose of providing these names is simply to give the attorneys information which may indicate the need or desirability to pursue persons other than operator(s) of the subject facility. The attorneys will eventually identify who is a responsible party. Generally, the following person(s) may be responsible parties:

a. Operators - present and past operators who operated on or controlled the property on which the alleged violations occurred, or which is the alleged source of a violation.

b. Owners - present and past owners of the property during the time violations occurred. This includes present owners of a property on which pollution is still present, even if the pollution may have been caused by prior operators or owners.

c. Parent corporations - where the subject property is owned by one company, a parent corporation of that company may also be liable if, for example, the parent has taken an active role in operating the subject facility, has dominated the activities of the operating company, or otherwise may have participated in causing the alleged violations.

d. Individuals - who may have participated in causing the alleged violation(s), or whose omission resulted in the alleged violations, or who supervised the illegal act but took no action to prevent or stop the alleged violations from occurring. Under case law, individuals such as employees or officers who fit the above description may be liable for violations.

6. Chrono ogy of Significant Events - This section includes a chronology of events significant to the case, such as inspections, important correspondence, sampling events, meetings, important telephone or personal conversations with the defendant, etc. Be sure to include and identify persons involved in each of the events. Include any relevant information regarding pending permit applications or any pending decisions upon which DEQ has not yet acted. Additionally, include information regarding potential enforcement actions being considered by other programs within DEQ, to the best of your knowledge. Check with the other program and regional office personnel within DEQ to ensure that all enforcement actions are coordinated.

7. Identification of sampling locations and rationale for selection of sampling locations - Frequently, the sheets providing the result of laboratory analyses do not provide the attorneys with enough information to determine the significance of the sample. For example, due to the limited space on the lab sheets, occasionally the sampling location is not identified in enough detail for the attorneys to tell where the sample was actually taken, nor does it provide the reason for taking the sample at that location. Background and upstream samples should be identified as such. Where not obvious from the sampling documents, the sampled media should be indicated (e.g. soil, liquid, solid, powder, air). A sketch of sampling locations can be especially helpful to clarify issues. This section should also indicate the present status of the samples, i.e. whether they have been retained or destroyed. This fact may be useful in discovery, as the defense counsel may wish to re-analyze the sample before trial. Be sure to note sampling and analysis procedures, and attach a copy of these procedures if possible.

8. Identification of sampling personnel - Identify all persons present during the sampling, and their respective positions, even if only one of these persons physically collected the sample(s).

9. Interpretation of Sample Results - Because most attorneys do not have scientific backgrounds, they may be unable to determine the significance of sampling results when they receive the laboratory sheets Therefore, it would be extremely helpful to indicate what the results of each laboratory analysis appear to conclude, so the attorney can determine whether theyhelp or detract from the case.

Identification of the strengths and weaknesses in sample results is critical to both effective negotiation and litigation. Information of this nature not only educates the attorneys about the case, but also gives more up-front warning about possible problems in a case, and thus perhaps more information for use against the defendant during early settlement negotiations in cases where the evidence is strong.

10. Identification of lab analysts - Since the state lab performs the majority of DEQ analytical work, it would be helpful to provide the attorneys with a list of the names of the individual analysts who worked on the samples. Where the lab analysts have initialized the parameters which they analyzed on the lab sheets, this identification need only be a list of names to match the initials.

11. Sampling methodology - If this information is included in the inspection report or in the inspector's field notes, a reference to those documents is needed in the referral. This information should describe the sampling method (e.g., grab sample), the sample container (e.g., glass 250 ml jar), preservatives used, and any other information necessary to prove the sample's validity. Otherwise, it is difficult to prove that the collection was performed in accordance with approved procedures. Information regarding sampling and laboratory analysis need not be provided in any one specific fashion as long as it can be clearly understood by the attorneys once received.

12. Locations of all document files inside and outside of DEQ - The importance of the attorneys knowing where all relevant files are located before filing a civil action cannot be over-emphasized. To properly evaluate a case for filing and engaging in settlement discussions, every document related to the defendant must be available for review. Sometimes, helpful and/or harmful information is stored at locations other than the primary source file. These locations may include the files of other programs, individual staff files including field notebooks or documents, calendars, datebooks and telephone records, laboratory files, and files located at the Regional Offices of DEQ.

13. Review of all public records requests specific to the referral - Once the referral has been made, no public records requests should be honored unless the Attorney General's Office has first reviewed the request and determined the appropriate response to the request. Once a civil case is filed, defendants are required to attempt to obtain pertinent information through discovery pursuant to the Rules of Civil Procedure, not the Public Records Act.

14. Settlement position - The referral package should contain sufficient information regarding DEQ's settlement position for the Attorney General's Office to write a complete first draft of the settlement offer for DEQ's review and approval. This information should include recommending compliance schedules, civil penalty assessments, injunctive relief, pollution prevention and any other supplemental alternatives that may be available.

5.4 Roles of the Attorney and Inspector during the Civil Enforcement Process

The purpose of a civil action is to compel compliance and to obtain remedies and penalties for violations. Before recommending a civil action, it is important to take into consideration that an action of this type is much more resource-intensive than an administrative enforcement action, and will likely require a more significant commitment of time from both DEQ staff and attorneys in pursuing the case. A team approach is critical to the success of any settlement or litigation activity;

hence both the enforcement staff and attorneys must keep open lines of communication and demonstrate the ability to work together as a team for a substantial period of time to be successful.

5.4.1 Role of the Attorney - The primary role of the Deputy Attorney General assigned to the case is to provide legal counsel to management and technical staff at DEQ. The Deputy Attorney General is charged with providing legal advice to the agency and acts on behalf of the State of Idaho.

For example, an inspector may be denied access to inspect a facility. If access cannot otherwise be gained, the attorney may work with the inspector to prepare an affidavit in support of obtaining a Search Warrant to inspect the premises. The attorney will then present the affidavit and relevant facts to a judge or magistrate in an attempt to obtain a signed order and search warrant. Often the deputy attorney general will work with the appropriate county prosecutor in obtaining a search warrant.

In the event the case reaches court and DEQ personnel are called to testify, the Attorney General's Office will advise them on the proper ways to proceed.

5.4.2 Role of the Inspector - The inspector's most important role has been completed before civil proceedings are even initiated. That is, s/he has taken great care to make sure all DEQ policies and procedures have been followed, that all relevant aspects of the compliance investigation have been explored, and that all alleged violations are thoroughly documented. **Assume that every inspection will end up in court**, so always be meticulous, objective and professional.

The Regional Enforcement Coordinator is responsible for preparing the Civil Referral Package and forwarding it through DEQ management to the Attorney General's Office. Once the Attorney General's Office has agreed to proceed with filing a civil complaint, the primary role of the inspector becomes that of providing technical assistance to the attorney assigned to the case.

Throughout the process of preparing the complaint, affidavits, interrogatories, motions, orders and settlement agreements, the Deputy Attorney General will typically solicit technical input from the inspector and other involved DEQ staff. The inspector may assist counsel in the following ways:

- explaining complex technical issues,
- developing a strategy,
- drafting written discovery requests and deposition questions,
- answering the defendant's discovery requests,
- helping with cross-examination of opposing experts,
- developing conditions and compliance schedules in settlement negotiations,
- helping prepare affidavits for use in motions for summary judgment,
- preparing exhibits to illustrate testimony,
- selecting other experts,
- drafting briefs,
- determining the appropriate civil penalty, and
- testifying as a witness in depositions, hearings, or trial.

Section 6: Criminal Enforcement Actions

6.1 Authority to Commence Criminal Enforcement Actions

The statutory authorities which exist for the Idaho Department of Environmental Quality (DEQ) to initiate a criminal enforcement action are found in both the Environmental Protection and Health Act (EPHA) at Idaho Code Section 39-117, and the Hazardous Waste Management Act (HWMA) at Idaho Code Section 39-4415. Stated broadly, those statutes provide that a person is guilty of a misdemeanor punishable by a fine or, under certain circumstances, imprisonment if he or she:

a. Negligently, knowingly, and/or willfully violates

   1. The environmental protection laws; or

   2. The terms of any lawful notice, order, permit, standard, rule, or regulation issued pursuant to an environmental protection law; or

b. Makes any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used to comply with the provisions of HWMA.

The specific citations are as follows:

> Idaho Code, Section 39-117 of EPHA: "any person who wilfully or negligently violates any of the provisions of the public health or environmental protection laws or the terms of any lawful notice, order, permit, standard, rule or regulation issued pursuant thereto, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than ten thousand dollars ($10,000) for each separate violation or one thousand dollars ($1,000) per day for continuing violations, whichever is greater."
>
> Idaho Code, Section 39-4415 of HWMA: "Violations constituting misdemeanors - (1) Any person who knowingly makes any false statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained or used for the purpose of complying with the provision of this chapter shall be guilty of a misdemeanor and subject to a fine of not more than ten thousand dollars ($10,000) or to imprisonment not to exceed one (1) year, or to both, for each separate violation or for each day of a continuing violation. (2) Any person who knowingly violates any provision of this chapter or any permit, standard, regulation, condition, requirement, compliance agreement, or order issued or promulgated pursuant to this chapter shall be guilty of a misdemeanor and subject to a fine of not more than ten thousand dollars ($10,000) or to imprisonment not to exceed one (1) year, or to both, for each separate violation or for each day of a continuing violation. (3) Any action may be commenced and prosecuted by the attorney general. The director shall not be required to initiate or prosecute an administrative or civil action before the attorney general may commence and prosecute a criminal action.

In addition, a number of the federal environmental statutes enforceable by the United States Department of Justice provide that certain egregious environmental violations constitute felonies. A person guilty of a criminal violation of the environmental protection laws may also have committed other misdemeanor or felony acts, such as fraud or creating a public nuisance, as described in the criminal code. Depending upon the circumstance, crimes committed in Idaho may be prosecuted by the Idaho Attorney General, the prosecuting attorney of the county in which the criminal action arose, or by the United States Justice Department through the United States Attorney.

6.2 Criminal and Civil Environmental Enforcement Actions

Generally, criminal enforcement is reserved for only the most grievous violations of environmental statutes, regulations and rules. In Idaho, criminal enforcement actions are quite rare. Criminal cases may be distinguished from civil ones by their greater magnitude, willfulness, negligence, and/or fraudulence. The decision as to whether criminal or civil proceedings should be pursued will be made by the Attorney General's Office, in consultation with the Program Manager, the Enforcement Coordinator, and the Regional Manager.

In some situations, it may be possible to pursue both a civil or administrative environmental enforcement action and a criminal action against a violator based on the same set of facts. A case-by-case decision must be made by the prosecuting attorney(s) whether it is better to pursue the two types of proceedings concurrently or to suspend prosecution of one proceeding (usually the civil one) pending completion of the other case.

6.3 Pursuit of Criminal Enforcement in Idaho

In Idaho, the following agencies are authorized to investigate and prosecute criminal environmental crimes: 1) Idaho Attorney General, 2) Idaho Department of Law Enforcement, 3) County Prosecutors Offices, 4) United States Attorney's Office, District of Idaho, 5) Idaho Department of Environmental Quality, and 6) Criminal Investigations Division,U.S. Environmental Protection Agency (typically Region X).

The Criminal Investigations Division (CID) is the section of the USEPA which investigates criminal violations for the majority of environmental regulations for all media in Idaho. Other states, such as California and Nevada, have felony and misdemeanor criminal statutes in effect and investigate criminal cases under their state law. States with criminal statute authority typically have their own criminal investigation programs. Since Idaho only has authority for misdemeanor violations, we do not have a state criminal investigation program.

Recently, the Idaho Environmental Enforcement Task Force (IEETF) has identified the need for the various state and federal criminal enforcement agencies to work together to share information and to avoid a duplication of efforts. The task force Memorandum of Agreement (MOA) memorializes the participating agencies and provides the functional foundation for the enforcement agencies to work cooperatively to preserve and protect the environment and the public health, safety, and welfare.

Section 7: Records Management and Public Records Review

This section of the manual addresses the management of DEQ records and the handling of public records requests. DEQ enforcement records may include documents generated by DEQ employees as well as other documents maintained in the DEQ files. Proper records management is important to preserve information to support any enforcement action. Records maintained at DEQ may be subject to public review under the Idaho Public Records Statute found at Idaho Code, Sections 9-337 to 9-349.

7.1 Records Management

The files related to an inspection or enforcement action comprise DEQ's legal documentation of its activities and findings. An enforcement file may include field notes, internal working drafts and final versions of inspection reports, Notices of Violation or Consent Orders, copies of internal memorandums and e-mails, investigatory records, and permits.

Documents in the DEQ files should be maintained in chronological order, with the most recent information on top. Most of the files at DEQ are maintained by clerical staff who take great care and caution ensuring the documents are filed correctly and in the appropriate location. Technical staff reviewing the files should make sure that documents are replaced correctly. Careless filing may result in delays in locating information and in potentially overlooking critical information.

DEQ has developed the "DEQ Policy Memorandum: Policy for Records Management" (see Appendix A) which sets forth the manner in which the retention and/or destruction of field notes, other notes, internal working drafts of DEQ documents, communications to or from the Attorney General's Office, confidential business information and investigatory records will be handled. The criteria for what constitutes a public record and an investigatory record are defined in Idaho Code as follows:

> Investigatory Records - Investigatory record as defined in Idaho Code, Section 9-337(4) means information with respect to an identifiable person, group of persons or entities compiled by a public agency pursuant to its statutory authority in the course of investigating a specific act, omission, failure to act, or other conduct which the public agency has regulatory authority or law enforcement authority over.
>
> Public Record - as defined in Idaho Code, Section 9-337(10), includes but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

Any relevant documents should be kept in a corresponding DEQ file. The following discusses issues relating to records management and a number of particular documents or situations:

7.1.1 Verbal Complaints - When a complaint is received by phone or in person, the complaint must be documented by a handwritten phone record, file note, or e-mail from the person receiving the complaint and interviewing the complainant. While DEQ discourages anonymous complaints, if a

caller insists on confidentiality the public records law allows DEQ to protect any information which might disclose the person's identity

7.1.2 General Communications - For each inspection or enforcement action, communications may occur in many forms and among many individuals. Copies of all correspondence, including requests for data and informational correspondence, should be placed in the relevant file. Telephone and personal conversations need to be carefully documented in writing in the file via a phone record/log format, a filenote, or a hard copy of an e-mail message. DEQ personnel should always maintain a discreet and professional manner when documenting conversations, meetings, interviews, inspection observations, sample and data collection activities, and interactions with individuals. To avoid loss of detail, notes should be prepared as soon as possible after the interaction or observation takes place. Notes should be dated, legible, accurate and complete. Language should be objective, factual, and free of personal feelings or inappropriate information.

7.1.3 Inspection Reports - A copy of every final inspection report with attachments should be included in the DEQ file. Prior to finalization of the report, the Regional Office supervisor will have reviewed the report for factualness, professionalism, objectivity, and comprehensiveness.

7.1.4 Sampling and Evidence Collection Documents - A copy of the receipt given to the facility when split samples are taken should be placed in the source file. All Chain-of-Custody documents, sample tags, etc., should be maintained as attachments to the inspection report and placed in the file. Generally, any records pertaining to sampling activity and evidence collection should become part of the file record.

7.1.5 Laboratory Analyses - Test results from any laboratory analyses made in connection with an inspection or otherwise should be placed in the source file.

7.1.6 Field Notes - Field notes generated by an inspector in whatever form (bound notebook, looseleaf pages, etc.) to record field activities constitute a public record. While these notes are not required to be physically maintained in the file itself during case development, once the report is completed, any field notes must be placed in the relevant DEQ source file; they <u>do not</u> belong to the inspector or in the inspector's personal files.

7.1.7 Photographs - Photographs should be kept in the relevant source file. Photographs should be stored in plastic storage sleeves. Each photograph should be labeled with a number so that it can be cross-referenced to a log describing the contents of the photograph. (See section 2.4 of this manual for specific suggestions on labeling photographs.) Negatives should also be placed in plastic storage sleeves, labeled with the facility name, date and location and maintained in the inspection file.

7.1.8 Tapes - Video and audiotapes should be maintained in the relevant source file. The tapes should be labeled with the name of the facility and location, the date and time of the activity(ies) being recorded, and the name and title of anyone who is recorded. Great care should be taken by the inspector when conducting inspection activities with the use of a video camera or tape recorder. When narrating a tape, the inspector should communicate only factual observations.

7.1.9 Calendars, Day-timers, Etc. - All documents generated by inspectors in the course of their employment are a public record, not the inspector's personal property, and should be maintained in the relevant file. Items such as personal calendars, day-timers, desk pads, etc., which contain work-related information are a public record for purposes of public records review and for use in any enforcement action.

7.1.10 Drafts - All internal working draft enforcement documents should be maintained in the file until the document is final, at which time the drafts should normally be removed and destroyed.

7.1.11 Confidential Information - Any materials which qualify or potentially qualify for a business information exemption to public records disclosure (trade secrets, business records) and any eligible communication to or from the Attorney General's Office regarding a particular enforcement action should be kept in a separate confidential section of the source file.

> "Trade Secrets" is defined in Idaho Code, Section 9-340(2) as, "a formula, pattern , compilation, program, computer program, device, method, technique or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

7.1.12 Databases - Many of the program offices at DEQ utilize databases to maintain data specific to the functions of that program. The air, water, hazardous waste, petroleum storage tank, drinking water, and remediation programs each maintain databases for tracking internal activities and for reporting purposes. This data can often be obtained by the public through a public information request. The data contained in databases may also be requested as part of an administrative, civil or criminal enforcement proceeding.

7.2 Public Records

The Idaho public records statute, Idaho Code, sections 9-335 and 9-337 to 9-349, provides that all DEQ records are open for inspection by the public unless a particular record is specifically exempted from public review. DEQ has developed a document entitled, "DEQ Policy Memorandum: Policy for Handling of Public Records Requests" (see Appendix J). Each division, program or regional office within DEQ has a designated public records custodian, and all public records requests should be routed through that person. All public record requests must be responded to within three days of receipt unless the person making the request is informed by a DEQ public records custodian that additional time is needed. Unless the public record requested is a list or in list form, you cannot ask a person making a public records request the reason for the request.

Any time a person submitting a public records request is not allowed access to a document or any portion of a document which falls within the scope of the request, it is a denial. Denials may be based on any one of several exemptions listed in the public records statute. The following are the exemptions most commonly cited as the basis for denying public records requests submitted to DEQ:

7.2.1 Lists - The public is not entitled to have access to DEQ information if the information is to be used for mailing or telephone solicitation.

7.2.2 Investigatory Records - A document may be withheld from public review if disclosure of the document would interfere with an ongoing investigation or enforcement action, reveal the identity of a confidential source, or disclose investigative techniques and procedures.

7.2.3 Attorney-Client Privilege - Communications between DEQ and the Attorney General's Office may be exempt from public records disclosure.

7.2.4 Confidential Business Information - The Idaho public records statute has three provisions which exempt business information from disclosure. The trade secrets exemption covers information that is claimed to be confidential and that, if disclosed, would be economically valuable to competitors. Production records are also exempted from disclosure. Finally, a voluntarily submitted environmental audit report may be exempt. A company's claim that a particular document is confidential is not enough to allow DEQ to deny a public records request. Before any information is withheld from public disclosure, the Attorney General's Office must review the confidentiality claim.

All denials of public records requests must be made pursuant to a procedure prescribed by the public records statute. All denials must have attorney review and be in writing. Any denial of a pubic records request should be coordinated with the Public Records Custodian.

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